and rules even when non-corrections agencies use mandatory language in the policies and rules.

Sandin has had the unintended consequences of eroding the federal principle that mandatory language in state rules and policies generally does create property or liberty interests outside of the corrections context. That is *Sandin* properly only applies to correctional policies and should have no application to other state agencies and certainly not to state personnel rules for merit state employees.

In *Hewitt v. Helms*, this court explicitly recognized that mandatory language in a State's statutory or regulatory code can create liberty and property interests that are protected by the Due Process Clause of the Fourteenth Amendment. *Hewitt* v. *Helms*, 459 U.S. 460, 471-72 (1983). In *Hewitt*, this Court ruled that a state statute mandating a hearing, and specific findings of fact, before a prison inmate could be placed in "administrative segregation," created a constitutionally protected liberty interest for the prisoner. *Id.*

Unfortunately, by explicitly shifting the focus of the liberty interest inquiry to the language of particular laws, and away from the type of deprivation a person endured, the *Hewitt* decision spawned inmate searches for mandatory language on which to base entitlements to state-conferred privileges. *Sandin v. Conner*, 515 U.S. 472, 481 (1995). In several cases following *Hewitt*, this Court was forced to sort through "[t]he language of intricate, often rather routine prison guidelines to determine whether mandatory language and substantive predicates created an enforceable expectation that the State would produce a particular outcome with respect to the prisoner's conditions of confinement." *Sandin v. Conner*, 515 U.S. at 480-81.

After noting additional problems with the Hewitt rule as applied to inmate litigation (including excessive court involvement in prison management and a disincentive for States

to codify prison policies) this Court abandoned *Hewitt*'s methodology regarding its due process inquiry for inmate claims. In *Sandin* this Court explicitly limited inmate Due Process protections to those prison actions imposing "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. at 484.

However, *Sandin* did not overturn *Hewitt's* core constitutional holding that mandatory language in a statute can create constitutionally protected interests. To the contrary, the *Sandin* decision explicitly affirmed the Appellate Court practice of drawing "negative inferences" from mandatory language in State regulations (where "shall" pursuant to a condition precedent, means "shall not" in the absence of that condition). The Court labeled this approach "entirely sensible in the ordinary task of construing a statute defining the rights and remedies available to the general public." *Sandin v. Conner*, 515 U.S. at 481. Moreover, the *Sandin* Court acknowledged that mandatory language may create protected liberty interests even for prisoners (albeit in more limited circumstances). *Sandin v. Conner*, 515 U.S. at 484.

Thus, *Hewitt* is good law as applied to non-prisoners in a non-correctional environment. Moreover, its reasoning directly governs this case because of the mandatory language in Utah rules governing the treatment of disabled state employees. The Utah Courts have ignored (or simply overlooked) the constitutional significance of the mandatory language in Utah law, which may have been fostered by an incorrect reading and application of this Court's holding in *Sandin*.

Mr. Draughon termination stems from an order to return to his previous position from leave without pay. Mr. Draughon was on medical leave without pay due to an ADA disability as acknowledged by state law. This leave was extended by the Agency on May 16, 2000 pursuant R477- 8-7(8)(a)(iv)(B)(II) (2000), which gives an Agency discretion to extend the time from when an employee is required to return from leave when

they suffer from a permanent disability. The relevant provisions of this rule state:

> (iv) Conditions for return from leave without pay shall include:
>
> (B) If an employee is unable to perform the essential functions of the position because of a permanent disability, the obligation to place the employee in the same or similar position shall be set aside. The employing unit shall place the employee in the best available, vacant position for which he is qualified, if able to perform the essential functions of the position with or without reasonable accommodations. If the employing unit does not have an available position, the agency shall then attempt to place the individual. The new position shall be consistent with the employee's qualifications and capabilities.
>
> (I) For the first year, every effort shall be made to find a position as close to the salary range and function as the original position.
>
> (II) The agency Executive Director may extend the timeline for return to work beyond one year if the employee's injury resulted in disability prohibiting the employee from performing the essential functions of the job, as defined by the ADA.

Utah Admin. Code R477- 8-7(8)(a)(iv)(B)(I) and (II) (2000). (Emphasis added).

Since Mr. Draughon was disabled and could not return to his previous job, the state had a mandatory duty to be place him in a lower level position under R477-8-7(8)(a)(iv)(B) and the state bore the burden of making such a placement and in providing written notice to him that he could be placed in a lower level position with reasonable accommodations. The Agency's failure to provide notice and failure to place Mr. Draughon denied him his state-created liberty and property interests for disabled state employees. This Court should grant this writ to right this wrong and to clarify that the Fourteenth Amendment still protects the rights of free citizens in a non-correctional environment.

II. THIS COURT SHOULD CLARIFY THAT JUST COMPENSATION IS MANDATED WHEN THE STATE DEPRIVES A CITIZEN OF LIBERTY OR PROPERTY TO ADVANCE SOME PUBLIC INTEREST ABSENT WRONGFUL ACTION BY THE CITIZEN.

This case presents an opportunity for this Court to clarify that its recent decision in *Kelo v. City of New London*, 125 S.Ct. 2655 (2005), does not apply to a taking of private property for the purpose of advancing some general public interest. The *Kelo* decision will result in some confusion as to the limits on a state's powers to deprive an innocent citizen of liberty or property for public purposes. Petitioner Ron Draughon is entitled to just compensation in this case because the sole basis for the state's deprivation of Mr. Draughon's state-created interests in his job, retirement, and medical benefits was to advance some general public interest.

The Utah State civil service laws have two bases for terminating an employee: (1) to advance the good of the public service and (2) for cause such as violation of state rules or laws. See Utah Code Ann. § 67-19-18(1) (2000). Mr. Draughon was admittedly terminated solely "to advance the good of the public

service." Both parties are unaware of any precedent in Utah where a career service employee was terminated solely on this basis. Whether terminating a state employee, without cause, advances the public service is not relevant. However, after taking Mr. Draughon's liberty and property interests to serve some public interest, the Fourteenth Amendment requires just compensation for Mr. Draughon's loss.

Mr. Draughon has suffered a substantive constitutional harm that can only be remedied by this Court. The Utah Appellate Courts failed to appreciate Mr. Draughon's right to just compensation. Other state courts are likely to make this same error and the Court's decision in *Kelo* will encourage states to take both public and private property from citizens to serve some general public interest if the Court does not clarify *Kelo's* application to private property interests.

III. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT ITS PRIOR DECISIONS ALLOW FOR DISMISSAL ONLY FOR CAUSE BASED UPON SOME FAULT OF THE EMPLOYEE AND DISMISSAL MERELY "TO ADVANCE THE GOOD OF THE PUBLIC SERVICE" IS UNCONSTITUTIONALLY VAGUE AND OVER-BROAD.

All parties agree that the sole basis for Mr. Draughon's dismissal was "to advance the good of the public service" within the meaning of Utah Code 67-19-18(1)(a) (2000). However, no employee in Utah had ever been dismissed solely on this basis. Instead, employees in every other case were dismissed "for cause" or state rules violations.

This court should also review this case because Utah Court rulings facilitate a type of unconstitutional "taking" that this Court has already explicitly forbidden on Due Process grounds. More importantly, by allowing this "taking," Utah's

Courts are corrupting the concept of "public use" as it connects to both areas of constitutional law.

In *Arnett v. Kenedy* this Court held that federal law 5 U.S.C. 7501(a), authorizing the removal or suspension of federal public employees "for such cause as will promote the efficiency of the service," was not unconstitutionally vague or over-broad, *but only* because it was based upon for cause criteria written in the Federal Personnel Management Act. *Arnett v. Kenedy*, 416 U.S. 134, 159 (1974).

The *Arnett* Court emphasized that the reason the federal statutory language was not over-broad, was that it was not "written upon a clean slate." *Arnett*, 416 U.S. at 160. It was written within a context of established and recognized principles governing for cause dismissal, principles that were then outlined in The Federal Personnel Manual, Sub-chapter S3--1. a. *Arnett,* 416 U.S. at 160, n.24. The court also noted that, at the time, the Civil Service Commission provided employees with access to legal counsel regarding the Act and its regulations, and that this fact *weighed heavily* on their decision to uphold the broad language, just as it had in a previous case. *Id., Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 580 (1973). (Emphasis added).

The *Arnett* decision *explicitly* affirmed the underlying principle behind the Due Process requirement of definiteness. It affirmed that the law must give a person of ordinary intelligence fair notice regarding the potential consequences of his conduct. *Arnett,* 416 U.S. at 159, *Colten v. Kentucky*, 407 U.S. 104, 110 (1972). However, *Arnett's* reasoning, which effectively anchors federal "efficiency of the service" language into a "for cause" analysis, is equally cognizable under this Court's "takings" jurisprudence. And this "takings" jurisprudence applies to all the States and their employees, including Utah.

Under *Roth*, rights to government employment are property for the purposes of constitutional analysis. *Board of Regents v. Roth*, 408 U.S. 570. The Fifth Amendment, by way of its incorporation against the States via the Fourteenth Amendment, forbids any State from "taking" property except for "public use." Applied to the facts of this case, the Fifth Amendment implies that Utah can "take" State employment away from Mr. Draughon only if furthering "the good of the service" is a legitimate "public use" of Mr. Draughon's employment. Because Mr. Draughon was fired under Utah's "good of the service" statute, and was not fired "for cause," "public use" under the "takings" analysis must indicate a benefit to the State of Utah that does not arise from any legally recognizable inadequacy on the part of Mr. Draughon's work performance.

However, *Arnett*'s Due Process analysis collapses the "good of the service" criterion into a "for cause" requirement, whereas Utah law draws a bright-line distinction between "for cause" and "the good of the service" terminations. This means that Utah Law not only violates United States Supreme Court Due Process precedent, its application in this case additionally corrupts the "public use" analysis of the "takings" clause and creates an unworkable tension between the Takings and Due Process clauses of the Federal Constitution.

Regarding the corruption of the "public use" criterion, this case detaches the concepts of "public use" and "the good of the service" (which are necessarily linked by the facts of this case and the Takings analysis) from any coherent and clearly expressed State purpose, and from any concept of a just cause. It is, after all, undisputed that Mr. Draughon was not terminated for cause or fault. It is further undisputed that the CSRB and the state agency employed no written criteria in determining that Mr. Draughon's termination would result in "the good of the service." It is further undisputed that the Agency lacks a written criteria specifying the conditions under which an

employee can be dismissed to "advance the good of the public service" under Utah law.

Given the still unsettled definition of "public use" that emerged from the Court's recent decision in *Kelo* (where this Court declared that economic development constituted "public use" but declined to offer a comprehensive "public use" test) this case affords the Court an opportunity to further clarify the "public use" standard as it applies to a form of property possessed by millions of citizens. Failing to take this opportunity, on the other hand, will increase vagueness in an area of law, and at a particular time, when such vagueness has become a significant source of uncertainty and fear.

Regarding the unworkable tension between the Takings and Due Process clauses of the Federal Constitution, the *Arnett* court's requirement that "the efficiency of the service" language be anchored in a "for cause" analysis arose from the Court's due process concerns about "notice." In ordinary "Takings" cases, notice of a proposed "Taking" is straightforward; the government sends written notice that it intends to condemn a property and holds public hearings on the proposal. But in cases where continued employment is the property that the State wants to "take" for "public use," as it is in this case, the State must do more than give written notice of a planned termination and hold a hearing. As *Arnett* and other decisions make clear, the standards governing government employment terminations must be clear enough to notify parties, in advance, as to what forms of conduct will result in their termination.

Thus, because continued employment property entitles the holder to a special type of advance notice of "what will cause termination" we get the following result: In cases of government employment termination, a termination can satisfy both the Takings clause and the Due Process clause of the Federal constitution only when the "public use" element of the Takings analysis is anchored in a "for cause" standard. Whenever the "public use" analysis strays from a "for cause"

conceptual mooring, the Takings and Due Process analysis will conflict.

Because both standards must be satisfied for a government employment termination to be constitutional, this Court should take this case and make the necessary clarification.

CONCLUSION

The Utah Courts failed to address or apply the federal constitutional principles relating to state-created liberty and property interests, taking of private property for public use, and terminating a merit state employee without cause. State merit employees in Mr. Draughon's position are protected by the Fourteenth Amendment from the actions taken by the state in this case. While Mr. Draughon pleads with this Court to right the wrong done to him, this Court should take this case to prevent further disregard of these important Due Process principles in other states courts.

RESPECTFULLY SUBMITTED this 25th day October, 2005.

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Ronald R. Draughon, Petitioner, v. Department of Financial Institutions, and Career Service Review Board, Respondents.

Case No. 20030575-CA

COURT OF APPEALS OF UTAH

2005 UT App 44; 2005 Utah App. LEXIS 45

February 3, 2005, Filed

NOTICE: [*1] NOT FOR OFFICIAL PUBLICATION

PRIOR HISTORY: Original Proceeding in this Court.

DISPOSITION: Affirmed.

COUNSEL: Frank D. Mylar, Salt Lake City, for Petitioner.

Mark L. Shurtleff, Brent A. Burnett, and Robert Thompson, Salt Lake City, for Respondents.

JUDGES: Russell W. Bench, Associate Presiding Judge. WE CONCUR: Norman H. Jackson, Judge, Gregory K. Orme, Judge.

OPINION BY: Russell W. Bench

OPINION:

MEMORANDUM DECISION

Before Judges Bench, Jackson, and Orme.

BENCH, Associate Presiding Judge:

Petitioner Ronald R. Draughon seeks judicial review of the final decision of the Utah Career Service Review Board (the CSRB) granting summary judgment to the Utah Department of Financial Institutions (the Department).

Draughon contends that the Department's motion for summary judgment was procedurally improper. Specifically, he argues that the statutes and rules governing the CSRB's procedures do not allow for such a motion. We review an "agency's application of its own rules for reasonableness and rationality." *Holland v. Career Serv. Review Bd., 856 P.2d 678, 681 (Utah Ct. App. 1993).*

Under *Utah Code section 67-19a-203*, "the board may make rules governing: . . . summary judgments." *Utah Code Ann. § 67-19a-203(3)* **[*2]** (2004). Draughon argues that the only mention of summary judgment in the relevant rules is R137-1-17(6), which applies exclusively to jurisdictional hearings before an administrator. See Utah Admin. Code R137-1-17(6) (2000). He therefore contends that it is only in jurisdictional hearings that a summary judgment motion is allowed. However, the CSRB's definition of summary judgment clearly applies to more than merely the jurisdictional hearing. Rule 137-1-2 provides:

> "Summary Judgment" means a ruling made upon motion by a party or the presiding official when there is no dispute as to either material fact or inferences to be drawn from undisputed facts, or if only a question of law is involved. The motion may be directed toward all or part of a claim or defense.

Utah Admin. Code R137-1-2 (2000). This rule provides that a motion for summary judgment can be "directed to all or part of a claim or defense." Id. (emphasis added). Parties may assert claims or defenses at various steps in the administrative grievance and appeal process, including the evidentiary hearing, and therefore a motion for summary judgment cannot logically be limited to a jurisdictional hearing. **[*3]** See *Utah Code Ann. § § 67-19a-403 to*

-*406* (2004); Utah Admin. Code R137-1-18 (2000), R137-1-21 (2000). The CSRB, acting with statutory authority, created an expansive definition of summary judgment and applied the procedure in this case. Its application in this context was not irrational nor unreasonable; therefore, the CSRB did not err in considering a summary judgment motion.

Next, Draughon argues that the CSRB erred in granting the summary judgment motion as a matter of law. He contends that the CSRB erred in dismissing his action because the Department inappropriately terminated him instead of placing him in a vacant position and providing any necessary reasonable accommodations. See Utah Admin. Code R477-8-7(10)(f)(iv) (2000). Furthermore, he asserts that there are disputed material facts, particularly regarding his ability and willingness to return to work.

We conclude that the Department met the requirements of R477-8-7(10)(f) n1, in regards to Draughon's Long Term Disability Leave. First, the Department was required to grant Draughon a one-year medical leave. See id. R477-8-7(10)(f). The agency not only granted the required year, **[*4]** but extended the time to almost seventeen months. See id. R477-8-7(10)(f)(iv)(B)(II). Second, the Department was required to place Draughon in his previous position, or one similar, only if he was able to return to the normal duties of the job. See id. R477-8-7(10)(f)(iv)(A). The agency attempted this action, but Draughon asserted, and does not dispute, that he was unable to return to his normal duties.

n1 Utah Admin. Code R477-8-7(10)(f) (2000) has been renumbered as R477-7-17 (2004).

Third, if the employee is unable to return to the previous position, the Department is required to "place the employee in the best available, vacant position for which he is qualified, if able to perform the job with or without reasonable accommodation." Id. R477-8-7(10)(f)(iv)(B) (emphasis added). Draughon asserts he was able to return to work with reasonable accommodations or in a less-

stressful position. However, the record does not support this assertion. The record indicates only that he was unable to return [*5] to work. Draughon's physician stated in a letter to the Department, "it is also my opinion that he is, at this time, unable to return to work and remains fully occupationally disabled as I have indicated in the past." From May 17, 1999, until October 17, 2000, Draughon never notified the Department that he was ready and able to come to work in any capacity. Draughon's last letter prior to termination does not state in the affirmative that he was able and willing to return to work nor does it request accommodations. Rather, the letter merely outlines the Department's duties under the law. The Department may only place an employee in a vacant position if the employee is able to perform the job. See id. The Department had no way of knowing of Draughon's capabilities without some affirmative notification from him. The Department's conclusion that Draughon was unable to return to work in any capacity is reasonable.

The CSRB properly dismissed Draughon's claims because there are no disputed facts in the record and the Department fulfilled its relevant requirements under the law.

Accordingly, the judgment of the CSRB is affirmed.

Russell W. Bench,

Associate Presiding Judge

WE [*6] CONCUR:

Norman H. Jackson, Judge

Gregory K. Orme, Judge

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW BOARD

RONALD R. DRAUGHON,	:	
	:	**AMENDED STATEMENT**
Grievant,	:	**OF THE ISSUES**
	:	**FINDINGS OF FACT,**
v.	:	**CONCLUSIONS OF LAW**
	:	**AND DECISION**
UTAH DEPARTMENT OF	:	
FINANCIAL INSTITUTIONS,	:	**Case No. 18 CSRB/H.O. 267**
	:	**Hearing Officer:**
Agency.	:	**K. Allan Zabel**

On August 21, 2001, the Hearing Officer issued a decision granting a motion by the Department of Financial Institutions (Agency) to dismiss the Step 5 grievance of Ronald R. Draughon (Grievant). Grievant thereafter filed a Request for Reconsideration, which after careful review was granted by the Hearing Officer. A step 5 evidentiary hearing was scheduled. The purpose of the hearing was limited by the Hearing Officer. The sole issue on which evidence was to be presented in the evidentiary hearing was whether Grievant was able to work in any capacity, with or without reasonable accommodation, on and after May 19, 1999. The hearing was held on April 2-3, 2002. The Agency was represented by Stephen G. Schwendiman, Assistant Attorney General. Also present for the Agency was Michael Jones, Chief Examiner of the Agency. Ronald R. Draughon, Grievant, was present together with his attorney of record, Frank Mylar. A certified court reporter made a verbatim record of the proceedings.

AUTHORITY

The authority of the Career Service Review Board (CSRB) to consider this matter is found at *Utah Code*, §67-19a-406 (2000), and *Utah Administrative Code*, R137-1-1 *et seq.* (2000).

Having received evidence in the form of testimony and documents, and having heard oral argument and received post-hearing briefs from the parties, and being otherwise fully advised in the premises, this Hearing Officer [Presiding Officer, *Utah Administrative Code*, subsection 63-43b-2(1)(h) (2000)], now makes and enters the following Statement of the Issues, Findings of Fact, Conclusions of Law, and Decision.

STATEMENT OF THE ISSUES

The issues presented in this case are: 1. Was Grievant terminated from State career service employment in violation of the meaning and intent of Department of Human Resource Management Rule 477-8-7(8)(a)(iv)(B), *Utah Administrative Code* (Supp. 2000);[1] 2. Was Grievant's termination within the authority of R477-8-7(11)(a); and 3. Was Grievant's termination for the good of the public service?

FINDINGS OF FACT

1. Grievant began work with the Agency on August 25, 1980. He was initially hired as a Field Examiner. In 1982 Grievant became a Deputy Supervisor of Banks, and in 1988 he became the Supervisor of Savings and Loans. During January 1996, Grievant was given an involuntary reassignment to the position of Senior Examiner.

2. Shortly after Grievant was involuntarily reassigned to the position of Senior Examiner in January 1996, Grievant initiated a grievance action over the reassignment. The Career Service Review Board (CSRB) determined that it did not have jurisdiction

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[1]. The Hearing Officer's Decision on Agency's Motion for Summary Judgment cited the 1999 version of this rule at R477-8-7(10)(f)(iv)(B). This citation was in error, as Grievant was dismissed in October 2000, and the 2000 Supplement therefore governed the dismissal. Since the wording of the rule is identical for both years, the error is inconsequential.

over issues of involuntary reassignment. Grievant then filed an action in District Court. The District Court decision dismissed Grievant's action by granting the Agency's motion for summary judgment, and Grievant appealed to the Utah Court of Appeals.

3. In early 1997, Grievant began seeing a psychiatrist, Dr. Michael C. Stevens, and a psychologist, Dr. Leonard J. Haas, for treatment.

4. In February 1999, the Utah Court of Appeals reversed the District Court and remanded the case back to the District Court " . . . for proceedings that allow appellant all grievance procedures owed to a demoted employee, consistent with the Personnel Management Act." See *Draughon v. Department of Financial Institutions*, et al, 975 P.2d 935 (Utah App. 1999). The Agency petitioned the Utah Supreme Court to grant certiorari in the case, and during the summer of 1999 the petition for certiorari was denied. The case remains unresolved and pending in the District Court.

5. Grievant requested Medical Leave in an email dated March 26, 1999. In this request Grievant asked both for time off work for medical and dental appointments, and further asked that he be relieved of his assignment as "Examiner in Charge" of a credit union examination.

6. Grievant's Supervisor, Mr. Jerry Jaramillo, responded to the request with an email dated March 31, 1999, in which Mr. Jaramillo advised that Grievant's March 26 request "constitutes a request for an accommodation under the Americans With Disabilities Act (ADA). Mr. Jaramillo's email notified Grievant that Grievant would be contacted by the Agency's ADA coordinator, Larene Wyss.

7. On April 1, 1999, Larene Wyss sent an email to Grievant asking Grievant to contact her regarding Grievant's ADA request. Larene Wyss was a Human Resource Specialist with the Utah Department of Human Resource Management in April 1999. She

had been so employed for about one and one half years, and had no previous experience with ADA requests for reasonable accommodation.

8. In a letter dated April 5, 1999, Grievant's psychiatrist, Dr. Stevens, stated that Grievant was experiencing a worsening of symptoms when he served as "a lead or chief examiner." Dr. Stevens requested that "consistent with the guidelines of the Americans with Disabilities Act, that he [Grievant] not be required to function in a lead examiner capacity at this time, but rather be given other assignments within his occupational speciality."

9. In his first contact with Ms. Wyss, Grievant asserted that he was not making an ADA request, and that Grievant did not consider Dr. Stevens' letter dated April 5, 1999, to be a request under the ADA. On April 6, 1999, Grievant called Ms. Wyss and a meeting between the two of them was scheduled for April 12, 1999. Grievant thereafter changed his mind about Dr. Stevens' letter of April 5, and hand-delivered a memorandum dated April 8, 1999, to Craig Kennedy, together with Dr. Stevens' letter of April 5, asking that it be considered as a request for reasonable accommodation under the ADA, and that Grievant be relieved of his assignment as Examiner-in-Charge of the Alpine Credit Union examination.

10. Grievant called on the morning of April 12, 1999, and canceled the meeting with Ms. Wyss. On April 15, 1999, Ms. Wyss sent letters to Drs. Stevens and Haas, with release forms signed by Grievant. The letter to Dr. Stevens was accompanied by a statement of the essential functions of the Senior Examiner position held by Grievant at that time, including the duties as an Examiner-in-Charge. Ms. Wyss requested that Dr. Stevens and Dr. Haas submit new letters concerning Grievant's medical condition and his ability or inability to perform the essential functions of his job, with or without reasonable accommodation, after the doctors had an opportunity to review the essential functions of the job. Craig Kennedy had prepared the statement of essential functions for the job.

11. An Examiner-in-Charge (E.I.C.) is not a specific position in the Agency. A team of examiners is assigned to a bank, credit union, other financial institution or industrial loan, and one member of the team is assigned as the team leader, or E.I.C. The assignment is rotated among the examiners as they move from assignment to assignment. Although it is the Agency's practice to have each examiner serve on rotation as an E.I.C., it is possible for an examiner not to be assigned as an E.I.C. for a period of time.

12. On April 14, 1999, Ms. Wyss recommended to the Agency that Grievant be reassigned to temporary duty while she reviewed his request for reasonable accommodation.

13. Then, in a communication dated April 19, 1999, Grievant again requested reasonable accommodation under the ADA. This time Grievant's request included that his last performance evaluation and a Corrective Action Plan on which he had been placed, be revoked. If the Agency would not revoke the annual performance evaluation and Corrective Action Plan, Grievant requested that he be provided with "significant and substantiated written source documents that concern the failure to meet standards, accompanied by signed and sworn statements from the original accusers as to their accuracy, . . ."

14. On April 20, 1999, Grievant sent an email to "C. [Craig] Kennedy," who at that time was the Chief Examiner and Human Resource Manager for the Agency. In his email, Grievant requested that he be assigned to bank and industrial loan examinations, and not to credit union examinations, and explained his reasons for the request. Grievant had asked one or two years previous to this request that he not be assigned to bank examinations, but that he be assigned to credit union examinations.

15. On April 23, 1999, Craig Kennedy responded to Grievant's request of April 20, via email in which Mr. Kennedy stated, in effect, that Grievant's request for reassignment would not be granted because the Agency was trying to give examiners

consecutive assignments in one type of examination to give them greater experience before assigning them to a different type of examination. Mr. Kennedy clarified in his testimony that Grievant could not be reassigned to different examinations because Grievant had to first meet the requirements of his Corrective Action Plan.

16. Sometime around April 19, 1999, or a few days thereafter, Grievant called Ms. Wyss and a new meeting was scheduled for April 28, 1999. Grievant, Ms. Wyss, and Cory Ervin, another Human Resource (HR) Specialist, met as scheduled on April 28.

17. On April 24, 1999, Grievant received an assignment schedule which showed him assigned to three credit union examinations through the month of May 1999, and as E.I.C. on two of the examinations.

18. Although Grievant's request to be reassigned to bank examinations was not granted, Grievant did not function as an E.I.C. on the Alpine Credit Union examination after April 24, 1999. However, it was the Agency's position that Grievant would not be given more bank examination assignments until he had first met the requirements of the Corrective Action Plan.

19. Some time on or after May 17, 1999, Grievant requested that he be placed on leave under the Family Medical Leave Act (FMLA).

20. Grievant met with Craig Kennedy on or about May 17, 1999. Grievant's request for reasonable accommodation was not discussed at that time, but Grievant felt that he had been threatened in the meeting with possible disciplinary action. In a letter to Grievant dated May 24, 1999, Mr. Kennedy notified Grievant that his request for FMLA leave was granted. The letter also made reference to a "proposed disciplinary action" consisting of a two-week suspension without pay.

21. Grievant felt traumatized as a result of the May 17 meeting.

22. Dr. Haas submitted a new letter to Ms. Wyss dated May 19, 1999; and Dr. Stevens submitted a new letter dated May 24, 1999. Dr. Haas' letter stated that Grievant was considered "largely incapable of productive work in his current work environment." Dr. Stevens' letter stated "his symptoms currently are severe enough to disable him occupationally temporarily in his current work environment. . . ."

23. After receipt of the letters of Dr. Haas dated May 19, 1999, and Dr. Stevens dated May 24, 1999, Ms. Wyss recommended to Grievant that he apply for Long Term Disability through the Public Employees Health Plan (PEHP), which Grievant subsequently did. Grievant was on a combination of annual and sick leave/converted leave from May 19, 1999 to July 6, 1999. Grievant entered into a period of FMLA leave which began on July 6 or 7, 1999, and ended on July 29, 1999. Grievant then received—after making four separate requests—medical leave without pay, which commenced on July 30, 1999, and was for a period of two months. PEHP thereafter notified Grievant, in a letter dated September 28, 1999, that his request for Long Term Disability was granted effective September 1, 1999. He has remained on Long Term Disability to the present time.

24. Pursuant to instructions from PEHP, Grievant filed two applications for Social Security Disability benefits. Both applications were denied; the first on the grounds that "although your impairment is severe at this time, it is not expected to be completely disabling for twelve months as required by law." The second denial was on the grounds that although Grievant suffered from "some psychiatric problems" he was considered to be "able to perform similar duties with a different employer."

25. Some time prior to July 1, 1999, the Agency requested the Grievant to turn in certain data and work papers from his last examination. After repeated attempts by Grievant to set the

conditions for return of the data and papers, the Agency finally received them on August 5, 1999, in a sealed envelope delivered by messenger.

26. Through July 1999, Grievant remained in contact with the Agency through use of a laptop computer which had been assigned to him when he was performing examinations for the Agency.

27. On August 12, 1999, the Agency sought recovery of the laptop computer which had been assigned to Grievant prior to his entry on leave for his medical condition. From August through December 1999 there was a series of correspondence between Grievant and the Agency regarding the Agency's request for return of the computer, to which Grievant repeatedly responded that ". . . my disability prevents me from returning the items or making arrangements to return the same by its [the Agency's] deadline. This is a continuation of its [the Agency's] illegal acts of discipline, discrimination, harassment, and retaliation taken against me by the Department because of my disability."

28. During July and August 2000, while Grievant was on Long Term Disability, Michael Jones, Chief Examiner for the Agency, had several discussions with the Executive Director of the Agency, Commissioner G. Edward Leary, about the need to seek funding from the Legislature to increase the number of examiner positions in the Agency. Both Mr. Jones and Commissioner Leary felt it would be difficult to convince the Legislature of a need for additional positions while Grievant's position remained unfilled. Even though Grievant was absent from the position for a valid reason, disability, Commissioner Leary felt this reason could not be explained to members of the Legislature because of Grievant's right to confidentiality about his disability.

29. On August 18, 2000, while Grievant was on Long Term Disability, the executive head of the Agency, Commissioner G. Edward Leary, sent a letter to Grievant notifying Grievant "that you either return to work with proper medical clearance or you will be

terminated from employment as provided by DHRM rule." Grievant was told in the notice that he must return to work by September 18, 2000. This notice also advised Grievant that since negotiations on all issues outstanding with Grievant had not resulted in resolution of those issues, the Agency would restore Grievant to his supervisor position, title and pay range, and would rescind the 1996 involuntary reassignment action, upon Grievant's return to work.

30. Grievant responded to the Commissioner's letter by letter dated August 22, 2000, in which Grievant stated: ". . . he [Dr. Stevens] and my psychologist have stood united in their opposition to my return to the 'Snake Pit.' I cannot return to the Department as long as you [Commissioner Leary] are there because of your history of discrimination against me because of my disability."

31. On September 5, 2000, Commissioner Leary replied to Grievant's letter of August 22, 2000, reaffirming that the medical leave would not be extended, and that Grievant must report to work by September 18, 2000.

32. Grievant responded to this new notice on September 10, 2000, by letter to Michael Jones, Chief Examiner, who had replaced Craig Kennedy in that position. In his September 10 response, Grievant stated that he had been unable to secure an appointment with Dr. Stevens, and therefore could not meet the September 18 deadline. Michael Jones, with approval from Commissioner Leary, notified Grievant in writing that the medical leave would be extended to and through October 8, 2000, to afford Grievant time to meet with his doctor, but that Grievant was to return to work by October 9, 2000.

33. Grievant responded on October 4, 2000, to the Commissioner's notice with a request for a reasonable accommodation to return to work. The reasonable accommodation requested was that the Agency "extend the time-line for me to return to work until I am able to perform the essential functions of the job as authorized by DHRM Rule 477-8-7(10(f)(iv)(B)(II)."

34. When Grievant submitted his response dated October 4, 2000, it was accompanied by a letter from Dr. Stevens, dated September 20, 2000, in which Dr. Stevens reported "It is also my opinion that he [Grievant] is, at this time, unable to return to work and remains fully occupationally disabled as I have indicated in the past."

35. On October 11, 2000, Commissioner Leary issued a Notice of Intent to Terminate, which was mailed to Grievant at his post office box address. The Notice of Intent included a brief review of the sequence of communications that occurred between Grievant and the Agency beginning with Commissioner Leary's letter of August 18, 2000, which notified Grievant that his medical leave would be terminated, to the date of the Notice of Intent to Terminate, and the following statement:

> . . . Your continued medical condition, as noted by your doctor, makes it impossible for you to perform the essential functions of your job. As such, you no longer meet the requirements for the position. By being unable to return to work and perform your duties you cannot comply with the directives given and comply with Rule R477-8-7(8)(a) (July 2000). Due to the need to provide services to those institutions under the Department's jurisdiction, this action is taken to advance the good of the public service.

36. Grievant responded to Commissioner Leary's Notice of Intent to Terminate by letter dated October 18, 2000, in which Grievant complained about Commissioner Leary's notice on various grounds, and included a statement by Grievant that

Commissioner Leary could appoint Grievant to "another position consistent with my qualifications and abilities . . ."

37. On October 20, 2000, Commissioner Leary issued a Notice of Termination, effective as of close of business on October 19, 2000. The termination was based on the reasons set forth in the Commissioner's Notice of Intent to Terminate dated October 11, 2000.

38. On one prior occasion, in 1995, the Agency assisted an employee who was on Long Term Disability to retire.

39. The Agency presently has three examiner positions vacant.

40. From May 19, 1999, to the present, Grievant has been unable to perform work in his regular position as a Senior Examiner, as an Examiner-in-Charge, or as a Supervisor. However, he has been able to perform examiner functions that do not involve being lead examiner.

41. During the period from May 19, 1999, until his letter dated October 18, 2000, Grievant did not request that he be allowed to work at a lesser position than Supervisor or Senior Examiner.

42. Grievant's termination from the Agency was the result of miscommunication from Grievant throughout the period from May 19, 1999, until his termination. Grievant's communications, as well as his doctors', led the Agency to believe that he was unable to perform any gainful work that may have been available at the Agency. Grievant's miscommunication appears to have been a result of his disability, rather than deliberate, intentional action on his part.

CONCLUSIONS of LAW

1. A career service employee may qualify for Long Term Disability for an initial period of 24 months by being unable, by

reason of physical or mental impairment, to perform the duties of the employee's regular occupation. After the initial 24-month period, the employee will qualify for Long Term Disability only if the employee is physically impaired to the point of being unable ". . . to engage in any gainful occupation which is reasonable, considering the employee's education, training and experience. . . ." *Utah Code*, §49-9-103 (2000).

2. When a career service employee has qualified for Long Term Disability, has submitted to his employer letters from his doctors stating that he is "fully occupationally disabled" and, during the first 24-month period of Long Term Disability, challenges his doctors' statements by asserting that he is able to perform other jobs than the one he held immediately prior to the commencement of his Long Term Disability, it is appropriate to place on that employee the burden of proof as to his ability to work in any occupation.

3. The evidentiary standard by which an employee must meet his/her burden of proof is the substantial evidence standard. *Utah Code*, 67-19a-2(c), (2000).

4. A career service employee who is determined eligible for the State's Long Term Disability Program is entitled to up to 12 months of medical leave without pay, if the leave is warranted by the employee's medical condition. *Utah Administrative Code*, R477-8-7(8) (2000).

5. An agency executive director may, at his or her discretion, extend a medical leave beyond the 12-month limit set forth in R477-8-7(8)(a)(iv)(B)(II). *Utah Administrative Code*, R477-8-7(8)(a)(iv)(B)(II) (2000).

STANDARDS OF THE CASE

The standards for considering the dismissal of State employees are: The agency dismissing an employee bears the burden of proof that the dismissal was for the good of the public service. *Utah Code*, §67-19a-406(2)(a), (2000). The evidentiary standard by which the agency must meet its burden of proof is

"substantial evidence." *Utah Code*, §67-19a-406(2)(c), (2000). Substantial evidence "is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Larson Limestone Co. v. State*, 903 P.2d 429,430 (Utah 1995) quoting *First National Bank v. County Bd. of Equalization*, 799 P.2d 1163,1165 (Utah 1990); see also *Zissi v. State Tax Commission*, 842 P.2d 848,853 (Utah 1992). "It is more than a mere 'scintilla' of evidence and something less than the weight of the evidence." *Johnson v. Board of Review of Indus. Commission.*, 842 P.2d 910,911 (Utah Ct. App. 1992).

At the step 5 hearing level, the hearing officer has the responsibility to determine whether the factual findings, as determined by substantial evidence, support the allegations made by the agency, and whether the agency has correctly applied relevant policies, rules, and statutes. *Utah Administrative Code*, R137-1-21(3)(a), (2000). If the hearing officer determines that the factual findings support the allegations of the agency, then the hearing officer must determine, giving deference to the agency's decision, whether the agency's decision is excessive, disproportionate or otherwise constitutes an abuse of discretion. *Utah Administrative Code*, R17-1-21(3)(b), (2000); *Career Service Review Board v. Utah Department of Corrections*, 942 P.2d 933 (Utah Ct. App. 1997).

DECISION

On August 21, 2001, the Hearing Officer issued a decision on the Agency's Motion for Summary Judgment/Motion to Dismiss. In that decision, it was noted that the Agency claims it had a right to terminate Grievant for several reasons, including insubordination, failure to meet the qualifications of the position in that Grievant was unable to perform the essential functions of the job, in not having the right to continued absence from work, and for the good of the public service. Further, the Agency contends that it had the right to terminate Grievant because his disability had extended beyond the 12-month period that is protected by R477-8-7(11)(a).

In response, Grievant contends that the Commissioner has authority to extend Grievant's leave without pay status beyond one year; further, that the Agency violated a duty to notify Grievant of his right to be placed by the Agency in another suitable job, in the Agency or with another State agency, with or without reasonable accommodation; also further, that the Agency had a duty to provide reasonable accommodation to assist him to perform the essential functions of his job or another job for which he is suited; and finally, that even if the Agency did not violate any of the foregoing responsibilities, §67-19-18(1)(a) is invalid because that section of law is overly broad and vague in violation of the First and Fourteenth Amendments to the U.S. Constitution, is overly broad and vague in violation of Article I, §7 of the Utah Constitution, and violates Article XVI, §1 of the Utah Constitution in that it is an abridgement of the protection of labor.

The Hearing Officer's decision on the Agency's Motion for Summary Judgement/Motion to Dismiss denied the Agency's claim of insubordination. While that issue was not reconsidered at the Step 5 evidentiary hearing, the Hearing Officer's reasoning and decision on that point will be repeated in this decision for the convenience of the parties and any reviewing authority. All other issues raised by the parties, either with respect to the Agency's Motion for Summary Judgment/Motion to Dismiss, or raised in connection with the step 5 evidentiary hearing, will be considered in this decision.

INSUBORDINATION

The Agency's contention that Grievant was terminated for insubordination is without merit. Although the Commissioner of Financial Institutions, in his Notice of Intent to Terminate dated October 11, 2000, cited the fact that Grievant "cannot comply with the directives given" to report to work, Grievant's inability to report to work was beyond his control. Insubordination requires some element of willfulness on the part of the actor. Grievant's failure to report to work as directed was due to his disability, and not to any willful intent.

AUTHORITY TO EXTEND LEAVE

R477-8-7(8)(a)(iv)(B)(II) provides that an executive director of an agency "may" extend the leave without pay status beyond the 12-month period stated in R477-8-7(11)(a). Grievant appears to argue that this provision mandates an extension if the employee remains on Long Term Disability at the conclusion of the 12-month period. However, the word "may" has an almost universal interpretation by courts, both within and without Utah, of conferring discretion on the decision maker. See "may," *Words and Phrases*, West Publishing Company. Neither party provided the Hearing Officer with any statute, rule or case as a guide for reviewing an agency head's exercise of discretion under this rule, nor is the Hearing Officer independently aware of such authority. Therefore, it is concluded that the appropriate standard for reviewing the decision of the Agency Executive Director to not extend Grievant's leave status, is to determine whether the decision was an abuse of discretion.

While not using the term "abuse of discretion" in his arguments, Grievant obviously contends that his dismissal was an abuse of discretion for several reasons, including retaliation for Grievant's filing of several prior grievances against the Agency, including the lawsuit over his "involuntary reassignment," discrimination because of his disability, and failure of the Agency to look for another position for which Grievant may be qualified. Commissioner Leary testified that the reason he felt he could not extend Grievant's leave status any further was the need to fill all vacant examiner positions before seeking funding from the Legislature for additional positions. Commissioner Leary explained that in his opinion he could not explain away Grievant's absence from his particular position, because Grievant had and has a right to confidentiality concerning the reason for his absence from work.

The Commissioner's explanation appears both plausible and reasonable on its face. The need to seek funding for additional examiner positions was a matter of discussion among agency management through the summer of 2000. Grievant offered no evidence to show that this reason was a pretext, or that

management's decision to fill his vacant position was in any other way arbitrary or an abuse of discretion.

FAILURE TO NOTIFY GRIEVANT OF A RIGHT TO BE PLACED IN ANOTHER POSITION

Grievant has contended quite vigorously throughout this grievance, in response to the Agency's Motion for Summary Judgment/Motion to Dismiss, in Grievant's Pre-hearing Brief, and in his Post-hearing Brief, that the Agency had a duty to notify Grievant of his right to be returned to his former position [R477-8-7(8)(a)(iv)(A)], or to be placed in another suitable position, or that the Agency had a duty to attempt to place him in another agency [R477-8-7(8)(a)(iv)(B)]. These rules read as follows:

R477-8-7(8)(a)

(iv) Conditions for return from leave without pay shall include:

(A) If an employee is able to return to work within one year of the last day worked, the agency shall place the employee in his previously held position or similar position in a comparable salary range.

(B) If an employee is unable to perform the essential functions of the position because of a permanent disability, the obligation to place the employee in the same or similar position shall be set aside. The employing unit shall place the employee in the best available, vacant position for which he is qualified, if able to perform the essential functions of the position with or without reasonable accommodation. If the employing unit does not have an available position, the agency shall then attempt to place the individual. The new position shall

be consistent with the employee's qualifications and capabilities.

(I) For the first year, every effort shall be made to find a position as close to the salary range and function as the original position.

(II) The agency Executive Director may extend the timeline for return to work beyond one year if the employee's injury resulted in disability prohibiting the employee from performing the essential functions of the job, as defined by ADA.

The Agency contends that Grievant's claim under the foregoing rule comes under the Americans with Disabilities Act (ADA), and is therefore outside the jurisdiction of the CSRB to consider. ADA claims are clearly outside the jurisdiction of the CSRB. R137-1-5(1). However, R477-8-7(11) gives rights to career service employees separate and apart from the ADA. That Grievant has proceeded under R477-8-7(8)(a)(iv) has been apparent throughout this grievance. The Hearing Officer therefore concludes that he has jurisdiction to consider Grievant's contentions under R477-8-7(8)(a)(iv).

Grievant contends specifically that he is entitled to notice of his rights under R477-8-7(8)(a)(iv), and that the Agency's failure to give such notice violates Grievant's right to due process because he has a property interest in his job. The due process issue will be addressed at a later point in this decision.

The rule is clear and unambiguous. Subparagraph (iv)(A) places on an agency the duty to return an employee to his former position or a similar position of comparable salary range if the employee is able to return to work from Long Term Disability within one year of the last day worked. Subparagraph (iv)(B) modifies this requirement if the employee is able to return to work, but is unable to perform the essential functions of his former position because of a permanent disability. In such a case, the duty imposed on an agency by subparagraph (iv)(B) is to place the employee in "the best available, vacant position for which he is qualified, if able to perform the job with or without reasonable accommodation." If the agency does not have such a position available, then the agency must attempt to place the individual with another State agency. This last duty is not optional under the rule. It is an affirmative duty imposed on the agency.

Whether the Agency had a duty to notify Grievant of his rights under R477-8-7(8)(a)(iv) is of little consequence in this case. The determinative issues with respect to this rule are whether Grievant was able to return to work and, if so, did the Agency fulfill its duties to him under the rule?

The facts of this case are conflicting and confusing, and do not lend themselves to a simple or easy application of the rule to the case. Because there are other factors in this case which impact on the overall decision, the application of R477-8-7(8)(a)(iv) to the facts of this case will be discussed at a later point in the decision. It is sufficient at this point to state that when an employee is able to return to work after a period of Long Term Disability, the employing agency has a duty to comply with the requirements of R477-8-7(8)(a)(iv).

CONSTITUTIONAL ISSUES

It is a generally accepted precept of administrative law that a hearing officer has no jurisdiction to rule on the constitutionality of a state law or rule. However, for the benefit of the parties, if any benefit there be, comment will be made on the constitutional arguments raised by Grievant, as such comment may be appropriate or helpful in understanding this decision.

Grievant was dismissed under authority of §67-19-18(1)(a), which states:

> (1) Career service employees may be dismissed or demoted:
>
> (a) to advance the good of the public service; or

REQUIREMENTS OF FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 1, §7 OF THE UTAH CONSTITUTION

Grievant raises two constitutional challenges to this provision of law. The first is that the law is invalid because it is overly broad and vague in violation of the First and Fourteenth Amendments to the U.S. Constitution and Article 1, §7 of the Utah Constitution. Grievant points out that a dismissal for just cause under §67-19-18(1)(b) is not subject to the same constitutional infirmity because there are other rules that "serve to interpret and define 'just cause.'" §67-19-18(1)(a), on the other hand, has no such saving rules defining when the dismissal of a career service employee would advance the good of the public service.

The Agency responds to Grievant's constitutional argument of vagueness and overbreadth asserting that the argument is without merit because the Agency "did not use that phrase in a vacuum, but coupled it with specific reasons and statements . . ." The Agency cites *Kent v. Utah Department of Employment Security*, 860 P.2d 984 (Utah Ct. App. 1993) and other cases in support of the proposition that there is no distinction between "just cause" and "to advance the good of the public service." The

Agency's reliance on this argument is misplaced for two reasons.

First, the Legislature is presumed to intend some meaning to every word and phrase in a statute, and the Legislature is presumed not to intend redundancy. *Arredondo v. Avis Rent A Car System*, 24 P.3d 928, 2001 UT 29; *Platts v. Parents Helping Parents*, 947 P.2d 658 (Ut, 1993) Proper statutory construction indicates that the Legislature did not intend subparagraphs 18(1)(a) and 18(1)(b) to have the same meaning.

Second, most of the cases cited by the Agency involve disciplinary actions. The Hearing Officer rejects the concept that the instant case is disciplinary in nature. Rather, it involves an employee whom the Agency considers unable, due to disability, to perform his job.

There are forms of dismissal which arise through no fault of the employee. These dismissals would, of necessity, have to be made under the authority of §67-19-18(1)(a), and not under the fault provision found in §67-19-18(1)(b). Since counsel for the parties and the Hearing Officer can find no Utah precedent for this type of dismissal, it is obviously a rarity. However, just because there is no record of anyone being dismissed under subparagraph 18(1)(a), the rarity of this type of case does not mean, as Grievant contends, that an agency has no right to make such a dismissal. Again, as noted previously herein, the Legislature is presumed to intend a purpose for each word and phrase in a statute. To say that an agency may not dismiss an employee under subparagraph 18(1)(a) is to deny the Legislature its intended purpose for that provision. This, the Hearing Officer cannot and will not do.

The constitutional infirmity which Grievant claims is inherent in §67-19-18(1)(a) is that it does not provide sufficient definition of the circumstances or conditions for which an employee may be dismissed "to advance the good of the public service" so that an employee may know when his or her conduct or circumstances could result in dismissal. Notices and warnings may constitute the kind of advance notification sufficient to forewarn an

employee of the possibility of dismissal. See *Kent, id.*, (in particular, footnote 4). In the instant case the notices issued to Grievant in August, September and October 2000, clearly explained the reasons for the Agency's intended action, and afforded Grievant the right to be heard before implementation of the intended action. Under these circumstances, the Hearing Officer holds that the applicable statute, §67-19-18(1)(a) is not overly broad or vague in this case so as to violate the First and Fourteenth Amendments to the U.S. Constitution or Article 1, §7 of the Utah Constitution. In addition, the procedure followed by the Agency fully met the requirements of §67-19-18(5) and, therefore, the Hearing Officer concludes that the Agency did not violate Grievant's due process rights under the U.S. Constitution.

REQUIREMENTS OF ARTICLE XVI, §1 OF THE UTAH CONSTITUTION

Grievant's second constitutional argument is that Utah Code §67-19-18(1)(a) violates the "Just Protection" requirement of Article XVI, §1 of the Utah Constitution on the grounds that DHRM rules create a property interest in career service employment under state law. Grievant theorizes that lack of notice of his right to return to his previous job denied him the just protection of labor required by the Utah Constitution. As noted previously, the failure of the Agency to give Grievant notice of his rights under R477-8-7(10)(f) does not make §67-19-18(1)(a) unconstitutional. Nor does it follow that Grievant's termination under §67-19-18(1)(a) automatically violated the Article XVI, §1 of the Utah Constitution.

In the instant case, Grievant's argument that it would service the public interest to keep his position vacant while his disability continues is without merit and defies simple logic. Holding open a position indefinitely because a disabled employee is unable to perform the essential functions of that position does not advance the good of the public service. Agencies have a need and a right to fill their vacant positions in order to accomplish their mission.

This does not mean that Grievant is without rights. Rather, his rights derive from §67-19-18(2), which provides that no employee may be dismissed because of disability, and from R477-8-7(10)(f)(iv), which governs the placement of a disabled employee who is able to perform some kind of work.

DUTY TO PROVIDE REASONABLE ACCOMMODATION

Grievant contends that the Agency had a duty to provide reasonable accommodation to assist him to perform the essential functions of his job or another job for which he is suited. Coupled with this contention is Grievant's often stated argument that if the Agency did not or does not have a position available for which he is qualified, the Agency has a duty under R477-8-7(8)(iv)(B) to try to find a suitable position for Grievant in another State agency. These are clearly rights to which Grievant is entitled, if he is able to work in any capacity.

The Agency's obligations under R477-8-7(8)(iv) are likewise clear, as stated previously herein. However, the Agency argues that Grievant is unable to work in any capacity, and points to some of Grievant's own correspondence with the Agency, and to statements by Grievant's treating medical doctor and psychologist, as support for the Agency's position.

It is this issue that is determinative of this case. If Grievant is able to work, then the Agency is duty-bound to place Grievant in a suitable position, with or without reasonable accommodation. The rule requires the Agency to first look within for a suitable vacant position. If no such position exists within the Agency, the rule requires the Agency to attempt to place Grievant with another State agency.

If Grievant is unable to perform any work, then the Agency has the right to terminate him. This is evident from R477-8-7(8)(a)(ii), which provides:

> (ii) If the employee is unable to return to work and has not used all

> available annual leave, he shall be paid for the annual leave **when the termination action is processed**. [Emphasis added.]

The evidence concerning Grievant's ability to work is conflicting. Grievant's communications with the Agency add to the confusion. Grievant's psychiatrist, Dr. Stevens, requested a "reasonable accommodation" for Grievant in a letter to the Agency dated April 5, 1999. Dr. Stevens explained that Grievant "experiences substantial excacerbation [sic] (worsening) of symptoms when he is in a lead or chief examiner position. Dr. Stevens went on in his letter to make the specific request that Grievant "not be required to function in a lead examiner capacity . . . , but rather be given other assignments within his occupational specialty."

The Agency treated this letter, together with Grievant's subsequent request, as a request for reasonable accommodation under the ADA. Thereafter, the process appears to have moved with some starts and stops, and then to finally break down. Grievant was not entirely cooperative with the Agency in its efforts to resolve his request. The Agency, in turn, appears to have taken a position, as evidenced by its actions, to deliberately oppose Dr. Stevens' request.

For example, on April 24, 1999, the Agency issued an assignment sheet for the last week of April and most of May, assigning Grievant as Examiner-in-Charge of two out of three examination assignments. In what appears to be an almost callous disregard of Dr. Stevens' request, the Chief Examiner, Mr. Kennedy, issued an email dated April 23, 1999, stating:

> . . . We want you to first master the credit union process and demonstrate that we can take you off corrective action by successfully performing the functions of Examiner-in-Charge on credit union examinations.

This occurred despite the recommendation of Larene Wyss that Grievant be temporarily reassigned until his request for reasonable accommodation could be resolved.

On May 17, 1999, Grievant attended a meeting with management personnel, the details of which are not in evidence. As a result of this meeting, Grievant felt that he was being threatened with possible disciplinary action. On May 19, 1999, Grievant and the Agency agreed to a period of leave, and Grievant subsequently applied for Long Term Disability benefits through the Public Employees Health Plan (PEHP). His application for Long Term Disability was granted beginning September 1, 1999.

At the end of one year of medical leave, the Agency agreed to a temporary extension of leave, while the parties were trying to negotiate a settlement of other grievances filed by Grievant, as well as his request for reasonable accommodation. The parties were apparently looking for some kind of a global resolution of their differences. For reasons that are not entirely clear, negotiations broke down during the summer of 2000.

Meanwhile, during that same summer, the Commissioner and his Chief Examiner, Michael Jones, discussed the need to seek funding for additional examiner positions. They felt that the success of their effort to obtain increased funding would depend on having all existing vacant examiner positions filled. Commissioner Leary then sent the letter of August 18, 2000, to Grievant, requesting that he report back to work, with a medical release, and if he was unable to return, that he would be terminated pursuant to R477-8-7(8)(a). A series of communications between Grievant and the Commissioner followed this letter, culminating in Grievant's termination effective October 20, 2000.

Grievant's first response to Commissioner Leary was a letter dated August 22, 2000, which included the statement:

> . . . he [Dr. Stevens] and my psychologist have stood united in their opposition to my return to the "Snake Pit." I cannot return to

> the Department as long as you are there because of your history of discrimination against me because of my disability.

This response was reinforced by Dr. Stevens' letter dated September 20, 2000, in which Dr. Stevens stated:

> . . . It is also my opinion that he [Grievant] is, at this time, unable to return to work and remains **fully occupationally disabled** as I have indicated in the past.
>
> Given the nature of the disorder, and the relationship between certain psychological stresses and exacerbation of the illness itself, I am unable to provide a predicted date of resolution of the disability. This is an indefinite event depending upon a number of variables which cannot at this time be predicted.

Based on these responses, and later communications from Grievant, Commissioner Leary proceeded with the termination process.

Dr. Stevens testified in the step 5 hearing that his language of "fully occupationally disabled" had reference only to the job assignment which Grievant held at the time he commenced his medical leave of absence. While the plain meaning of the language would appear to mean much more than that, Dr. Stevens' testimony is consistent with his original letter of April 5, 1999. And the additional language of "certain psychological stresses and exacerbation of the illness" is also consistent with the language of the April 5, 1999 letter.

While the Agency's reading of Dr. Stevens' letter dated September 20, 2000, and Grievant's letters would logically lead to the conclusion that Grievant was unable to perform any work whatsoever, the intended meaning, coupled with the doctor's letter of April 5, 1999, and the events immediately after that letter, clearly indicate that Grievant was able to work. Although all of the circumstances and events from 1999 through October 2000, taken

together, would suggest otherwise, the Hearing Officer has no choice but to accept the medical evaluation of Dr. Stevens. See *Shelley A. McGoffin v. JoAnne B. Barnhart, Commissioner, Social Security Administration*, Slip Opinion filed May 3, 2002, Case No. 01-5094 (10th Cir. 2002) (reported at http://laws.findlaw.com/10th/015094.html).

The difficulty of this issue is not in determining whether Grievant is able to work, but rather, since the evidence supports the conclusion that Grievant is able to work in some capacity other than the position he held at the commencement of his medical leave, what is the appropriate remedy now that his termination from the Agency has been effectuated? Under normal circumstances R477-8-7(8)(a)(iv) is clear that an employee able to return to work in some other capacity would be entitled to a vacant position within the former employing agency, with or without reasonable accommodation.

The Agency argues with respect to the foregoing conclusion that Grievant is not entitled to a position because he has not established that his disability is permanent. Dr. Stevens' letter is clear, to the contrary. In saying that Grievant's condition is "an indefinite event," Dr. Stevens is saying that it is permanent. The definition of permanent is "lasting," "durable." *New Expanded Webster's Dictionary*, 1988 edition. It also includes "indefinite," "for the foreseeable future." See "permanency, permanent - Disability or Incapacity," *Words and Phrases*, 1998 Cumulative Annual Pocket Part West Publishing Company.

However, in the instant case, Grievant has made it clear that he is unable to return "to that Snake Pit." Further, that he cannot return as long as Commissioner Leary remains as the agency head. Changing commissioners is not a reasonable accommodation. Thus, it would be a disservice to both Grievant and the Agency to order the Agency to place Grievant in one of the currently vacant examiner positions. Therefore, it would appear that the only appropriate remedy available to Grievant and the Agency is to

return the parties to their status as of May 19, 1999, so that Grievant may have the benefit of his rights under R477-8-7(8)(a)(iv).

ORDERED

Therefore, it is hereby **ORDERED** that Grievant shall be restored to leave without pay status as of the date this Amended Decision is issued, and the Agency shall make all reasonable efforts to help Grievant find a suitable position, all in accordance with R477-8-7(8)(a)(iv). This Amended Decision shall not be construed by the parties to require the Agency to appoint Grievant to one of the currently vacant Examiner positions, nor shall the Agency be prohibited from doing so. It is the intent of this Amended Decision that the Agency have complete discretion whether to appoint Grievant to an Agency position or to help him find a position in another agency of the State of Utah.

It is noted that the Agency filed a timely appeal for a Step 6 review of the original Step 5 decision issued May 8, 2002. Since Grievant's Request for Reconsideration takes precedence over the Agency's appeal, counsel for the Agency is hereby notified that if the Agency wishes to continue to pursue its Step 6 appeal after this Amended Step 5 Decision has been issued, counsel must either file a new appeal or otherwise notify the Administrator of the Career Service Review Board that the Agency desires to have its original Step 6 appeal moved forward and considered by the Board. The Agency must file its new appeal or notice of intent to proceed with its original appeal within 10 working days after the amended Step 5 decision is issued, in accordance with *Utah Code* §67-19a-407(1)(a)(i).

DATED this 4th day of June 2002.

/s/ Robert W. Thompson for
K. Allan Zabel
Hearing Officer
Career Service Review Board

APPEAL

Any appeal of this formal adjudicative decision must be filed with the Career Service Review Board within ten working days upon receipt of this decision according to *Utah Code* §67-19a-407(1)(a)(i).

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW BOARD

RONALD R. DRAUGHON,	:	
	:	
Appellant and Respondent,	:	**DECISION AND**
	:	**FINAL AGENCY ACTION**
v.	:	
	:	
UTAH DEPARTMENT OF FINANCIAL INSTITUTIONS,	:	
	:	**Case Nos. 7 CSRB 66 (Step 6)**
Appellant and Respondent.	:	**18 CSRB/H.O. 267 (Step 5)**

The Career Service Review Board (Board or CSRB) conducted an appellate review of the above-entitled case on April 23, 2003. The following Board members heard oral argument and deliberated in an executive session: Acting Chairperson Gloria E. Wheeler, Joan M. Gallegos and Felix J. McGowan. Ronald R. Draughon (Draughon) appeals from a Step 5 Decision. Draughon was present and was represented by his attorney of record, Frank D. Mylar. The Utah Department of Financial Institutions (Department or Agency) also appeals from the Step 5 Decision. Stephen G. Schwendiman, Assistant Attorney General, represented the Department and Paul Allred, Deputy Director, as well as Michael Jones, Chief Examiner, were present as the Department's Management Representatives. Since both parties are appealing, the term "Appellant" will not be used.

AUTHORITY

The Board's statutory authority is found at *Utah Code*, §67-19a-101 through -408 (2002) entitled *State Officers and Employees Grievance and Appeal Procedures* which is part of the *State Personnel Management Act* found at §67-19-1 *et seq*. The CSRB's administrative rules are published in the *Utah*

Administrative Code at R137-1-1 through 23. This Step 6 or Board appeal hearing is the final administrative review of both the Agency's and Draughon's appeals. Both the evidentiary/Step 5 hearing and the Step 6 appellate proceedings are formal adjudications under R137-1-18 (2)(a). The provisions of the *Utah Administrative Procedures Act* (UAPA) governing formal adjudications are applicable to both Step 5 and Step 6 proceedings.

STANDARDS OF REVIEW

A. The Summary Judgment Proceeding and Step 5 Hearing Standards of Review

In considering the Department's and Draughon's respective positions, the Hearing Officer in this matter conducted oral argument on the Department's Motion for Summary Judgment on July 30, 2001, and granted the motion. He then held a Step 5 evidentiary hearing on April 2-3, 2002, pursuant to Draughon's Request for Reconsideration. Hearing officers must adhere to R137-1-21(2) (Conduct of Hearings), which states in pertinent part that "[A] hearing shall be confined to those issues related to the subject matter presented in the original grievance statement." In determining grievance issues, CSRB hearing officers also are required to follow R137-1-21(3), which states:

> (3) Evidentiary/Step 5 Hearing. An evidentiary/step 5 hearing shall be a new hearing for the record according to subsections 67-19a-406 (1) and (2), held de novo, with both parties being granted full administrative process as follows:
>
> > (a) The CSRB hearing officer shall first make factual findings based solely on the evidence presented at the hearing without deference to any prior factual findings of the agency. The CSRB hearing officer shall then determine whether:
> >
> > > (i) the factual findings made from the evidentiary/step 5 hearing support with substantial evidence the allegations made by the agency or the appointing authority, and

(ii) the agency has correctly applied relevant policies, rules, and statutes.

In his Decision on Agency's Motion for Summary Judgment/Motion to Dismiss [Including Findings of Fact, Conclusions of Law and Decision], the Hearing Officer stated that he applied the provisions of R137-1-21(3) to the Motion for Summary Judgment proceedings on July 30, 2001, and to his subsequent decision.

B. The Board's Appellate Standards of Review

We review this appeal under R137-1-22(4)(a) through (c) which reads as follows:

(a) The board shall first make a determination of whether the factual findings of the CSRB hearing officer are reasonable and rational according to the substantial evidence standard. When the board determines that the factual findings of the CSRB hearing officer are not reasonable or rational based on the evidentiary/step 5 record as a whole, then the board may, in its discretion, correct the factual findings, and also make new or additional factual findings.

(b) Once the board has either determined that the factual findings of the CSRB hearing officer are reasonable and rational or has corrected the factual findings based upon the evidentiary/step 5 record as a whole, the board must then determine whether the CSRB hearing officer has correctly applied the relevant policies, rules, and statues according to the correctness standard, with no deference being granted to the evidentiary/step 5 decision of the CSRB hearing officer.

(c) Finally, the board must determine whether the decision of the CSRB hearing officer, including the totality of the sanctions imposed by the agency, is reasonable and rational based upon the ultimate factual findings and correct application of relevant policies, rules, and statutes determined according to the above provisions.

FACTUAL BACKGROUND

Draughon was employed by the Department for approximately 20 years and was last employed as a Senior Bank Examiner. Prior to serving as such, he had been employed as a Field Examiner, a Deputy Supervisor of Banks, and finally, the Supervisor of Savings and Loans. He was "involuntarily reassigned," i.e., demoted, to the position of Senior Bank Examiner in January of 1996. He filed a grievance contending that his reassignment was equivalent to a demotion. The CSRB determined that it did not have jurisdiction over involuntary assignments and Draughon filed an action in district court to get his former position back as the Supervisor of Savings and Loans.

The district court dismissed Draughon's lawsuit and he appealed to the Utah Court of Appeals. The Court of Appeals reversed the district court's decision in February 1999. It remanded the case to the lower court to "allow the appellant all grievance procedures owed to a demoted employee, consistent with the Personnel Management Act." *Draughon v. Department of Financial Institutions, et al.*, 975 P.2d 935 (Utah App. 1999). The Department then filed a Petition for a Writ of Certiorari with the Utah Supreme Court that was denied during the summer of 1999. As of April 23, 2003, the date of the Step 6 oral argument hearing, that case remains unresolved.

During the pendency of the Department's appeal to the Utah Supreme Court and beginning in spring 1999, negotiations to resolve the differences between the Department and Draughon began. There also was communication between the parties relating to Draughon's request for leave sometime prior to May 17, 1999. The Department granted him leave in mid-May. Draughon then took leave under the Family Medical Leave Act (FMLA) between July 6 (or 7) and 29, and the Department granted him medical leave without pay after that date. On September 1, 1999, Draughon was approved for long-term disability (LTD) with the Public Employees Health Plan. Draughon's LTD status expired in September 2000.

On August 18, 2000, G. Edward Leary, Commissioner for the Department, wrote to Draughon informing him that no further medical leave would be granted due, in part, to the Department's need to fill Draughon's position. The letter stated that he was required to return to work by September 18, and that if he could not or failed to do so, he would be dismissed. He was informed that since he had been on medical leave and then LTD, his treating physician would need to submit a medical release allowing him to return. The notice also advised him that the Department would restore him to his supervisor position, title and pay range, rescinding the 1996 involuntary reassignment action (which was the subject matter of the ongoing lawsuit) if he returned to work by the deadline.

Indicative that negotiations between the parties had continued for more than a year, but had broken down, Draughon replied on August 22, 2000: "It has always been my intention to make a counter-offer. I shall do so if you rescind your official notice [of termination]." Draughon's letter also said, "Dr. Stevens and my psychologist have stood united in their opposition to my return to the 'Snake Pit'. I cannot return to the Department as long as you [Commissioner Leary] are there because of your history of discrimination against me because of my disability."

By letter dated September 5, 2000, Commissioner Leary replied that medical leave would not be extended, and asked him to submit any offer or counteroffer by the September 18 deadline (when his leave expired) so that the Department could consider it. Draughon responded that he needed to meet with his doctor and required an extension of time to make a counteroffer. The extension of time was granted. His doctor sent the Department a letter dated September 20, 2000, in which he opined that Draughon "was unable to return to work and remains fully occupationally disabled as I have indicated in the past." Thereafter, Draughon wrote to the Department on October 4, 2000, and requested "a reasonable accommodation that you extend the time-line for me to return to work until I am able to perform the essential functions of the job. . . ."

Although Draughon's "leave" had been extended past the original deadline, it finally ended on October 9, 2000. He had been directed to return to work on October 10. He did not. On October 11, Commissioner Leary issued a Notice of Intent to Terminate. The notice stated that Draughon could have a meeting with him on October 19, to respond to the proposed termination. In lieu of the meeting, Draughon sent a letter dated October 18, informing the Department that it had violated R477-8-7(10)(f)(iv)(B) on the grounds that it failed to look for another position for which he was qualified, with or without reasonable accommodations. On October 20, 2000, Commissioner Leary issued a Notice of Termination that was effective as of close of business on October 19, 2000. Draughon thereafter filed a timely grievance to the CSRB objecting to his termination.

PROCEDURAL BACKGROUND

A. The Summary Judgment Hearing and Decision

After Draughon filed several preliminary motions, the Department filed a Motion for Summary Judgment on June 4, 2001. Oral argument was set for June 18, but prior to that time, Draughon filed several "petitions" or motions requesting continuances. One request for continuance was based on the alleged fact that the hearing notice was improper because it failed to identify the hearing officer assigned to the case. That request was summarily denied. Another request for continuance, however, was based on Draughon's need for representation at the upcoming hearing. That request was taken under advisement.

On the day set for the summary judgment hearing, Draughon appeared and tendered an "amended petition" reiterating, *inter alia*, his need for representation. After a discussion on the record, the Hearing Officer rescheduled the summary judgment hearing for July 30, because "it would disserve both Mr. Draughon's interests and the State's interests to proceed without him having an opportunity to consult legal counsel." Oral argument on the Department's Motion for Summary Judgment resumed on July 30,

2001, with Draughon being represented by his current attorney of record, Frank Mylar.[2]

In support of its motion, the Department argued that Draughon was properly terminated for: (1) insubordination; (2) failure to meet the qualifications of his position in not being able to perform the essential functions of the job and in not having the right to continued absences from work; and (3) the good of the public service. In response, Draughon countered that: (1) numerous disputed facts made disposition of his case by summary judgment and subsequent dismissal inappropriate; (2) his termination was in retaliation for his prior grievances; and (3) the Department failed to make any efforts to find him another position for which he was qualified as required by R477-8-7(10)(f)(iv)(B).

The Hearing Officer issued his Decision on Agency's Motion for Summary Judgment/Motion to Dismiss Including Findings of Fact, Conclusions of Law and Decision (Summary Judgment Decision) on August 21, 2001. He found the Department's contention that Draughon was terminated for insubordination without merit. The Hearing Officer also found that Draughon's assertions of retaliation and discrimination consisted of bare allegations and were insufficient to counter the Department's motion and supporting affidavits. Finally, the Hearing Officer determined that Draughon "removed himself from the protections of R477-8-7(10)(f)(iv)(B) —to be placed in another position"—via his written communications with the Agency in that he gave no timely indication that he sought to return to work in any capacity. The Hearing Officer granted the Department's Motion for Summary Judgment and upheld Draughon's dismissal.

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[2]Draughon was previously represented by attorney Frank Nakamura who withdrew from representation at the beginning of May 2001, as well as attorney Elizabeth Dunning, who also withdrew her representation shortly thereafter.

B. The Step 5 Evidentiary Hearing and Decision

Under R137-1-21(12)(b), a party may request reconsideration of a Step 5 formal adjudicative decision. Draughon filed a request for reconsideration of the Summary Judgment Decision within the requisite ten working days. The request was granted. Based on arguments in the memorandum supporting the request for reconsideration, the Hearing Officer issued an order explaining he believed that there were several questions regarding whether Draughon could have returned to work during the time he was on medical leave or after the date of termination. Draughon requested discovery. The Department objected to certain discovery on the basis that it was irrelevant and further, beyond the scope of the Hearing Officer's order for the Step 5 proceeding. A separate discovery hearing was conducted to address the Department's objections and in large measure, the objections were overruled.

A Step 5 evidentiary hearing was scheduled and held April 2-3, 2002. The Utah Public Employees Association (UPEA) filed either an amicus brief or a motion to intervene in the case pursuant to *Utah Code*, §63-46b-9, to which the Department objected. Draughon also filed a prehearing brief which raised several issues. The hearing was limited to the issue of whether Draughon was able to work in any capacity, with or without reasonable accommodation, on and after May 19, 1999, and whether he had notified the Department that he could have returned to work in some capacity. The Hearing Officer determined that UPEA's motion and Draughon's prehearing brief would be treated as post-hearing motions. He also decided that each side could respond to UPEA's motion to intervene and the Department could respond to Draghon's prehearing brief. He ordered that there would be no further evidentiary hearings.

After a two-day hearing, the Hearing Officer issued his Statement of the Issues, Findings of Fact, Conclusions of Law and Decision (Step 5 Decision) on May 8, 2002. He ordered Draughon be placed on the reappointment roster and that the Department "make all reasonable efforts to place Grievant with another State

agency, in a position for which Grievant is qualified, with or without reasonable accommodation."

C. The Amended Decision

Having received post-hearing briefs from the parties, the Hearing Officer then issued an Amended Statement of the Issues, Findings of Fact, Conclusions of Law and Decision (Amended Decision) on June 4, 2002. Whereas the original Step 5 Decision determined that "the only appropriate remedy available to Grievant and the Agency is to hold the Agency responsible for helping Grievant find suitable employment somewhere else in State government," the Amended Decision concluded that "the only appropriate remedy available to Grievant and the Agency is to return the parties to their status of May 19, 1999, so that Grievant may have the benefit of his rights under R477-8-7(8)(a)(iv)." The Amended Decision concluded:

> Therefore, it is hereby ORDERED that Grievant shall be restored to leave without pay status of the date this Amended Decision is issued, and the Agency shall make all reasonable efforts to help Grievant find a suitable position, all in accordance with R477-8-7(8)(a)(iv). This Amended Decision shall not be construed by the parties to require the Agency to appoint Grievant to one of the currently vacant Examiner positions, nor shall the Agency be prohibited from doing so. It is the intent of this Amended Decision that the Agency have complete discretion whether to appoint Grievant to an Agency position or to help him find a position in another agency of the State of Utah.

Among other additional findings, three new findings of fact helped form the basis for the Amended Decision as follows:

> 40. From May 19, 1999 to the present, Grievant has been unable to perform work in his regular position as a Senior Examiner, as an Examiner-in-Charge, or as a Supervisor. However, he has been able to perform examiner functions that do not involve being a lead examiner.
>
> 41. During the period from May 19, 1999, until his letter dated October 18, 2002, Grievant did not request that he be allowed

to work at a lesser position than Supervisor or Senior Examiner.

42. Grievant's termination from the Agency was the result of miscommunication from Grievant throughout the period from May 19, 1999 until his termination. Grievant's communications, as well as his doctors', led the Agency to believe that he was unable to perform any gainful work that may have been available at the Agency. Grievant's miscommunication appears to have been a result of his disability, rather than deliberate, intentional action on his part.

Before the Amended Decision was issued, Draughon apparently filed two additional requests for reconsideration and the Department filed an appeal under *Utah Code*, subsection 67-19a-407(1) for a Step 6 review of the original Step 5 decision. The Amended Decision addressed the timing of the reconsideration requests and the appeal:

> Since Grievant's Request for Reconsideration takes precedence over the Agency's appeal, counsel for the Agency is hereby notified that if the Agency wishes to continue to pursue its Step 6 appeal after this Amended Step 5 Decision has been issued, counsel must either file a new appeal or otherwise notify the Administrator of the Career Service Review Board that the Agency desires to have its original Step 6 appeal moved forward and considered by the Board. The Agency must file its new appeal or notice of intent to proceed with its original appeal within 10 working days after the amended Step 5 decision is issued, in accordance with *Utah Code*, 67-19A-407(1)(a)(i).

DRAUGHON'S ISSUES ON APPEAL

Draughon's appeal contains three primary components. The first is a request for specific relief: "Reinstatement to an examiner position within the Agency and back pay and benefits accrued, and all other benefits and remedies available to Grievant under all applicable laws and rules."

The second component is an appeal to substantially revise the Hearing Officer's findings of facts in the last of the three

decisions (the Amended Decision). The Amended Decision contains 42 findings of fact, three more than were contained in the original Step 5 Decision; the additional findings are referenced above as #40 through #42. Draughon's proposed findings, which total 68, incorporate many of the Amended Decision's findings, modify some of those findings by deletion or augmentation, and add 26 others. He seeks the Board's determination that some of the Amended Decision's findings are "not reasonable and rational because they lack substantial evidence for their support in the record." He further contends as part of his appeal that his proposed findings: (1) are more accurate and are more clearly supported by uncontroverted portions of the record; (2) augment certain findings which are material to Grievant's numerous claims on appeal; (3) are not disputable; and (4) correct alleged mistakes. He also argues, however, "Grievant maintains on appeal, that the Board can and should grant all relief requested by Grievant without changing or augmenting any of the Findings of Fact [in the Amended Decision]."

The five "Questions Presented on Appeal" comprise the third component:

> (1) Whether the hearing officer erred in failing to either place grievant in one of the three available examiner positions or in the alternative, place grievant on paid leave, when the hearing officer concluded that grievant carried his burden of proof in the hearing (this point does not require any changes in the findings of fact);
>
> (2) Whether the hearing officer erred in his findings of fact, conclusions of law, and decision;
>
> (3) Whether the hearing officer made erroneous legal conclusions in failing to conclude that agency's reliance upon Utah Code 67-19-18 (1) (a) as the sole basis for dismissal of grievant, violates grievant's state and federal constitutional rights as applied and on its face;
>
> (4) Whether the hearing officer failed to properly apply article XVI, section 1 of the Utah Constitution by failing to conclude that the agency action and application of *Utah Code* 67-19-18

(1) (a), constituted a violation of the "Just Protection" clause of the Utah Constitution; and

(5) Whether the hearing officer erred in law by failing to conclude that the agency's actions constituted wrongful discrimination based upon grievant's disability and exercising his career service grievance rights in violation of *Utah Code* 67-19-18 (2).

DEPARTMENT'S ISSUES ON APPEAL

The Department believes the Hearing Officer unacceptably abused his discretion by ordering the Step 5 proceeding to hear new evidence and issues:

(1) The hearing officer committed reversible error when he ruled that the issue to be heard in the [Step 5] hearing was whether grievant could have returned to work in some capacity on May 17, 2000 or later when such was unknown to [the] agency;

(2) The hearing officer ignored the clear evidence that grievant could not, would not and did not return to work;

(3) The hearing officer erred in holding [the] agency responsible for information that was not provided by grievant at the time of the decision but which was disclosed at the hearing;

(4) The hearing officer erred in holding that grievant's failure to present any medical clearance that he was able to return to work can be waived and ignored; and

(5) The hearing officer erred in holding that grievant's disability was permanent requiring agency to place grievant in another position.

In essence, the Department argues that the Hearing Officer got it right the first time when he issued the Summary Judgment Decision.

BOARD REVIEW AND ANALYSIS

The threshold issues of this Step 6 proceeding turn on: (1) whether the Hearing Officer, as a matter of law, had the authority to conduct the Step 5 hearing to determine the issues Draughon outlined in his request for consideration; and (2) whether the Hearing Officer, as a matter of law, abused his discretion in issuing the Step 5 Decision and subsequently the Amended Decision. [Thus, before considering Draughon's issues on appeal—which flow from the Amended Decision—it makes sense to first examine the Department's contention that the Hearing Officer's decision to allow additional evidence into the record after the Summary Judgment Decision as to whether Draughon could have worked in some capacity had no basis in law.] If the Hearing Officer committed reversible error by holding the Step 5 hearing after issuing the Summary Judgment Decision, Draughon's issues on appeal are mostly moot.

As noted above, Draughon was employed by the Department for approximately 20 years prior to his termination. He was last employed as a Senior Bank Examiner. Prior to serving as such, he had been employed as a Field Examiner, a Deputy Supervisor of Banks, and finally, the Supervisor of Savings and Loans. He was "involuntarily reassigned," i.e., demoted, to the position of Senior Bank Examiner in January 1996. Following Draughon's request for leave in May 1999, the Department left his position open for the entire period he was on leave, medical leave (FMLA) and LTD up through the date of his termination. Draughon and his counsel stipulated at the beginning of the Step 5 hearing that from May 17, 1999, until October 17, 2000, neither Draughon, his physicians, his legal counsel nor anyone else actually notified the Department that he was ready and able to come back to work in some capacity.

In the Amended Decision, the Hearing Officer surmises that ***but for*** the testimony of Dr. Michael Stevens at the Step 5 hearing, all the circumstances and events from 1999 through October 2000, taken together, would "suggest" that Grievant was unable to work.

The Amended Decision also observes that "the Agency's reading of Dr. Stevens' letter dated September 20, 2000, and Grievant's letters would logically lead to the conclusion that Grievant was unable to perform any work whatsoever…[***but for the intended meaning*** of the September 20, 2000 letter – coupled with the doctor's letter of April 5, 1999….]" (emphasis added). The Amended Decision subsequently concludes that "Grievant's termination from the Agency was the result of miscommunication from Grievant throughout the period from May 19, 1999, until his termination. Grievant's communications, as well as his doctors' letters, led the Agency to believe that he was unable to perform any gainful work that may have been available at the Agency." Finally, the Amended Decision relied on the case of *McGoffin v. Barnhart*, 288 F.3d 1248 (10th Cir. 2002) in stating, "[T]he Hearing Officer has no choice but to accept the medical evaluation of Dr. Stevens."

In summary, then, the Hearing Officer concluded that: (1) The 10th Circuit case of *McGoffin v. Barnhart* compelled him after granting the Department's Summary Judgment Motion to hear Dr. Stevens' testimony relating to Draughon's medical condition and his opinion that Draughon could have returned to work in October 2000; (2) Dr. Stevens' April 5, 1999 letter was indicative of the fact that Draughon could have come back to work in some capacity a year and a half later; (3) Dr. Stevens' testimony about his intended meaning of his September 20, 2000 letter was actually reflective of the fact that Draughon could have come back to work in October 2000; and (4) Draughon and his doctors "miscommunicated" with the Department about his ability and desire to return to work.

Of initial importance is the letter dated April 5, 1999, from Draughon's treating psychiatrist, Dr. Michael C. Stevens, to the Department. In that letter Dr. Stevens states: "[Draughon] is experiencing a worsening of symptoms when he serves as a lead or chief examiner…and [should] not be required to function in a lead examiner capacity ***at this time*** (emphasis added), but rather be given other assignments within his occupational specialty." While this letter clearly outlines that Dr. Stevens believed that Draughon

should be given another position with the Department for medical reasons, the opinion was rendered ***before*** Draughon went on leave in May 1999, and was not reiterated ***after*** Draughon had been out on leave and receiving additional medical treatment until the Step 5 hearing. In fact, ***no*** medical opinion releasing Draughon for work for ***any*** position was issued after he went on leave in May 1999. Thus, while the letter may support the assertion that Draughon could have worked in another position during a particular window of time (before he went on leave), it does not rationally lead to the conclusion that over a year and a half later, he could have returned to work and taken another position within the Department.

The remaining letters from Draughon, Dr. Leonard J. Haas (Draughon's treating psychologist) and Dr. Stevens, which the Hearing Officer characterizes as "miscommunication," are as follows:

- On May 19, 1999, Dr. Haas sent a letter which stated: "[Draughon is considered] largely incapable of productive work in his current work environment."

- On May 24, 1999, Dr. Stevens concluded that: "[Draughon's] symptoms currently are severe enough to disable him occupationally temporarily in his current work environment."

- On August 5, 1999, Draughon indicated that he could not return to work because "my psychologist and my psychiatrist have not released me to return to the office."

- On December 10, 1999, Draughon wrote to the Department that he was still on LTD and could not return to work.

- On July 21, 1999, Draughon asked the Department not to require him to return to work because it would jeopardize his LTD application.

- On July 24, 1999, Draughon wrote: "Failure to approve my medical leave without pay would intentionally jeopardize my health, it would intentionally jeopardize my long term disability claim, and it would jeopardize my employment."

Remaining "circumstances and events" and letters from May 1999 through October 2000 that also are characterized as "miscommunication consist of:

- Draughon testified that he never told anyone in the Department that he wanted a different position.

- He testified that he never asked anyone in the Department for a different position.

- He testified that he did not drop his lawsuit pursuing his former position of supervisor.[3]

- In response to Draughon's request for a medical opinion of his ability to return to the Department, on September 20, 2000, Dr. Stevens opined: "It is my opinion that Mr. Draughon has not had resolution of this medical illness. It is also my opinion that he is, at this time, unable to return to work and remains fully occupationally disabled as I have indicated in the past." "...I am unable to provide a predicted date of resolution of the disability. This is an indefinite

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[3]It is more than a little curious that approximately a month before Draughon was terminated, the Department offered him the same supervisor position (with the same title and pay range) that he continues to pursue his Third District Court lawsuit contesting his involuntary re-assignment in 1996, and while on appeal to the CSRB, asks for an examiner position.

event depending upon a number of variables which cannot at this time be predicted."

- On October 4, 2000, Draughon sent a letter to the Department stating in pertinent part: "I am unable to return to work at his time because my disability prohibits me from performing the essential functions of the job."

After Dr. Stevens' April 1999 letter, it is, quite simply, impossible for a rational person to interpret the meaning of any written communication between Draughon (and his doctors) and the Department that Draughon ***was willing and able to return work in any capacity***. In fact, if Draughon and his doctors somehow intended the above communication to signify that Draughon was willing and able to return to work in some capacity, they completely failed to communicate their intention to the Department before Draughon was terminated.

Draughon failed to provide a doctor's release, statement or other document permitting him to return to work. He failed to provide any doctor's statement which clarified or modified the alleged "miscommunication" that he was not "fully occupationally disabled" and able to work in a different position. The only "accommodation" Draughon requested ***after*** going on leave and ***before*** his termination was an indefinite extension of time to return to work. Draughon was directed to report for work on October 10, and failed to do so. Draughon did not appear for the October meeting with Commissioner Leary to present his side of the proposed termination although he was informed that "the purpose [of the informal hearing] is to provide you an opportunity to meet with me and present any information you believe is important in making a final decision." Based on the above, there is no substantial evidence to support a finding that Draughon wanted to return to work or to return to work in a different position. In fact, such a conclusion is irrational.

In addition, the Hearing Officer's reliance on the *McGoffin* case to support the assertion he had to hear Dr. Stevens' testimony at the point he heard it is misplaced; our reading of that decision does not support the Hearing Officer's conclusion. In that case, an administrative law judge (ALJ) held an evidentiary hearing to determine whether to award disability benefits to which the claimant asserted she was entitled. He denied the benefits and the claimant appealed. On appeal, the 10th Circuit held that an ALJ is required to give controlling weight to a treating physician's well-supported opinion, ***so long as it is consistent with other substantial evidence in the record*** (citations omitted) (emphasis added). The Court found that the ALJ refused to give ***any*** weight to the treating physician's assessment for three different reasons. First, the ALJ refused to believe the treating physician actually signed the medical assessment although there was unrefuted evidence to the contrary. Second, the ALJ rejected the medical report for the unsubstantiated assumption, that the treating physician [who actually signed the evaluation] did not agree with the assessment. Third, although the 10th Circuit had previously held that a hearing officer's assertion that a family doctor naturally advocates his patient's cause is not a sufficient basis on which to reject a physician's medical opinion, the ALJ had felt the claimant's doctor signified a "certain advocacy posture."

The *McGoffin* case has no application in the current matter. Unlike *McGoffin*, the issue on appeal here is not ***how much weight*** should have been accorded to Dr. Stevens' testimony, or whether there was adequate evidence to support a finding that Dr. Stevens' medical assessment was valid, but rather, ***whether Dr. Stevens' testimony*** (in large part about his intended meaning of his September 20, 2000 letter) ***was properly received into evidence after the Summary Judgment Decision had been issued.*** Moreover, under *McGoffin*, Dr. Stevens' testimony would have been rejected for the reason that it was inconsistent with the other substantial evidence in the record.

It is unwise at best—and disastrous at worst—to establish a precedent that an employee who has been out on leave and has

been notified of the termination deadline has little or no responsibility to convey his desire to return to work and supply the necessary medical release evidencing that desire, whether or not the employee wants a different job. In *Snyder v. Jefferson County School District*, 842 P.2d 624 (Colorado 1992) (re'hring denied), a case extremely similar to the present one, a state employee (a teacher) took sick leave with pay at the end of the 1983-84 school year, and then was placed on unpaid leave for a period of time for medical reasons. The employee's teaching certificate expired while the teacher was on leave. Thereafter, the school district informed the teacher that she would not be eligible to return to work without obtaining a valid current teaching certificate.[4] The terms of the leave of absence required the employee return to work at the beginning of the 1984-85 school year. At the beginning of September 1984, the teacher's two therapists sent a letter opining that the employee's medical procedures would be completed by November and that she could return to work in January. Pursuant to this letter, the teacher then requested an extension of leave without pay for "personal health reasons" which the district denied. The district reminded the teacher that her teaching certificate had expired and that she was to respond whether or not she was returning to work by the end of September.

On October 9, the employee sent a letter requesting "her position or compensation for the loss of her position." On November 8, the assistant superintendent asked to meet with the teacher no later than November 16, to ascertain if the teaching certificate had been renewed, and if not, the employee was informed that she would be terminated effective October 9. The meeting ultimately took place at the end of November, but the teacher did not provide the necessary certificate until mid-January.

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[4]Although the employee is referred to as "she" above for convenience, it would be technically more accurate to describe teacher as "he" before November 1984 and as "she" after November of 1984. The teacher's absence from the workplace was due to a sex-reassignment surgery and therapy.

The district terminated the tenured teacher effective October 9, as it previously notified her it would.

After several years of administrative and lower court appeal proceedings, the Colorado Supreme Court affirmed the Colorado Court of Appeals determination to uphold the employee's dismissal for "other good and just cause" on the basis that she lacked certification within the timeframe that was required. The Court noted that the teacher's leave of absence had expired and that her request to extend it had not been approved. In effect, the Court held that without the necessary documentation evidencing her eligibility to return to work, the school district had no choice but to terminate her.

The *Snyder* case is instructive. The employee in that case, like Draughon, took leave for medical reasons. She, like Draughon, was given a deadline to return to work and the deadline was extended several times. The teacher then asked for an extension of leave without pay that was denied, as is the case here. Although she met with the assistant superintendent to discuss her pending dismissal (unlike Draughon, who did not appear at the scheduled meeting with Commissioner Leary), she failed—***before the deadline***—to provide the requested documentation which would have allowed the school district to put her back to work. As noted throughout this Decision, Draughon never provided the Department with the necessary medical release so that he could actually return to the workplace.

The Department met its obligations in this matter. When an employee goes on LTD, the insurance carrier keeps the agency informed about the employee's status while the agency holds the employee's job open.[5] When LTD ends, the insurance provider gives the agency notice. The agency, in turn, notifies the employee that he or she must return to work by a date certain. If leave was

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[5]An agency is only required to hold the position open for a year; if LTD continues beyond a year, the agency can try, but is not required, to find a commensurate position.

taken for medical reasons, proof of medical clearance is requested for the employee to rejoin the workforce. That is exactly what occurred in this case.

A reasonable person who truly wanted to return to work would communicate that wish to his or her employer. Draughon's letter to the Department shortly before the termination deadline, however, protested: "My doctors oppose me returning to the snake pit; I can't come back as long as you [Commissioner Leary] are there." It is not tenable to place the burden on an agency to somehow recast this response as, "I am ready, able and willing to come back to work – and will provide the necessary medical release allowing me to do so at some indeterminate future point, but I want another position within the Department when I decide to return."

Draughon knew he had to produce a medical release. Craig Kennedy, Chief Examiner, granted him FMLA leave under the condition that he obtained medical clearance before returning to work. Commissioner Leary also wrote to Draughon on August 18, 2000, in pertinent part: "Before you can return, however, you must obtain medical clearance from your treating health care provider. This clearance must certify that you are able to return to work and perform the essential functions of your job. If you do not or are not capable of returning to work in this thirty-day period and cannot obtain medical clearance to do so, the Department will process your termination...." Commissioner Leary then informed Draughon on September 5, that "any concern about being able to provide the appropriate doctor's clearances by that date [the deadline to return to work] should be discussed with Michael L. Jones [Chief Examiner]. I would encourage you to ***contact him as soon as possible with any concerns*** as well as to help your transition in returning to work." (Emphasis added.)

The response Draughon made to these letters was to request additional time to see his doctor, ostensibly to obtain the release.[6] By failing to take the appropriate steps at the appropriate time, i.e., clearly identifying what alternative accommodation(s), if any, he sought after being informed of the re-employment deadline, and most important, providing the necessary medical release enabling him to return to work and actually showing up to report for work, Draughon, like the teacher in the *Snyder* case, effectively terminated himself by abandoning his job. The burden to affirmatively act shifted to him (again, as in the *Snyder* case) after Commissioner Leary directed him to return to work or be terminated, not once, but twice.

In summary, the Hearing Officer committed reversible error as a matter of law in a number of areas. As a matter of law, the Step 5 hearing never should have been held pursuant to Draughon's Request for Reconsideration of the Summary Judgment Decision. It is neither rational nor reasonable to conclude that Draughon could have returned to work in some capacity in October 2000 and that the Department violated policy based on Dr. Stevens' opinion 18 months later when the Department was unaware of those alleged facts. The Hearing Officer committed reversible error when he ruled that Draughon's termination was a result of his "miscommunication" with the Department. In fact, there is no substantial evidence to support a finding that there was "miscommunication." Draughon's responses to the Department are clear and unambiguous. He stated that he was unable to return to work. He stated that his doctors would not release him to return to work. He stated that he would not return to work. He never stated, however, that he wanted a different position with the Department. In addition, there simply is no evidence, let alone substantial

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[6] Michael Jones extended the deadline for Draughon to meet with his doctor "to provide the appropriate medical clearances; this time is given in order to provide you with adequate time to meet with and consult with your psychiatrists and any other individuals you deem necessary in making a determination as to your ability to return to work. It is your responsibility to meet this extended deadline."

evidence, in the record to support the Hearing Officer's conclusion that the "miscommunication" was not intentional, but rather a result of Draughon's disability.

Draughon and his attorney had the opportunity to raise the issues they set forth in the Request for Reconsideration in the summary judgment proceeding and failed to do so.[7] The content of Dr. Stevens' September 2000 letter stating that Draughon's medical illness was not resolved and that he was unable to return to work was no surprise to Draughon, because it was he who provided it to the Department. It was only after the unfavorable and legally dispositive summary judgment decision had been issued did the focus change to what the Department somehow should have known from Dr. Stevens' intended, but clearly uncommunicated meaning in his September 2000 letter. To rely on Dr. Stevens' testimony about what he intended to say in his September 2000 letter, nearly a year and a half after Draughon had been terminated and the Department's motion for summary judgment had been granted, is an abuse of discretion. Absent fraud the Department should not be penalized for Draughon's failure to timely raise an issue of such central importance to his position, particularly when the Department made its decision to terminate based on the information it had been provided by Draughon and his doctors.

The panoply of other claims Draughon raises on appeal are without merit. Draughon was dismissed because he did not show up for work before the extended termination deadline. This conduct constitutes "just cause" for the termination. The Department could no longer hold Draughon's job open when he was out of leave and refused to return to work. Terminating a State employee who fails to provide a medical release and does not return to work is done "to advance the good of the public service" under subsections 67-19-18(5) and 67-19-18(1)(a). While that phrase is general in

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[7]Draughon was represented by legal counsel at the time and was not acting *pro se*. However, even if he had been representing himself, that would not justify a second bite at the apple to the Department's detriment.

nature and used to label or categorize particular conduct warranting termination, Draughon was clearly terminated for specific conduct, i.e., failure to return to work, of which he was made fully aware would subject him to dismissal. Extended deadlines and the clarity of repeated notifications provided an overabundance of due process. Thus, the term does not run afoul of any constitutional prohibitions whether based on alleged vagueness or overbreadth concerns.[8] *Accord Despain v. Dep't of Corrections*, 4 CSRB 32 (1991); *Kent v. Utah Dep't of Employment Security*, 4 CSRB 40 (1992).

Similar claims linked to similar constitutional violations (e.g., "rights of labor clause"/violations of "just protection") are likewise without merit and furthermore, require a number of assumptions about alleged facts which are not in the record. There is no legal or policy requirement for an agency to inform an employee that he or she is entitled to ask for a workplace accommodation. Nor was the Department under any obligation to order a fitness for duty evaluation under these specific circumstances. It was not, and should not be, an agency's responsibility to ferret out an employee's desire for an alternative job assignment or to produce a medical release enabling the employee to return to work. Thus, it was not the Department's responsibility in this case. Moreover, there was no legal obligation for the Department to look for another position when Draughon and his doctors failed to make it clear that is what they wanted. There was no legal obligation to grant additional leave either. Finally, there was no evidence in the record to support Draughon's claims of discrimination and retaliation, only bare bones allegations that were properly rejected by the Hearing Officer in his Summary Judgment Decision.

DECISION

Based on the foregoing and Board's belief that the Hearing Officer committed reversible error as outlined above, we conclude that the Amended Statement of the Issues, Findings of Fact,

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[8]Draughon's claim on appeal that he was without notice of the proscribed conduct for which he was dismissed is nothing short of astounding.

Conclusions of Law and Decision (referred to above as the Amended Decision) should be vacated and the Decision on Agency's Motion for Summary Judgment/Motion to Dismiss Including Findings of Fact, Conclusions of Law, and Decision (referred to above as the Summary Judgment Decision) should be reinstated. The only change should be a correction to the *Utah Administrative Code Rules* citation of R477-8-7(10)(f)(iv)(B) which the Hearing Officer noted in his Amended Decision had been renumbered as R477-8-7(8)(a)(iv)(B) during the relevant time period.

DATED this 19th day of June 2003.

DECISION UNANIMOUS
Gloria E. Wheeler, Acting Chair
Joan M. Gallegos, Member
Felix J. McGowan, Member

/s/Gloria E. Wheeler, Acting Chair
Career Service Review Board

RECONSIDERATION

A party may apply for reconsideration of this Step 6 formal adjudicative decision and final agency action by complying with *Utah Administrative Code*, R137-1-22(10), and *Utah Code* §63-46b-13, Utah Administrative Procedures Act.

JUDICIAL REVIEW

A party may petition for judicial review of this formal adjudication and final agency action pursuant to *Utah Administrative Code*, R137-1-11, and *Utah Code*, §63-46b-14 and -16, Utah Administrative Procedures Act.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Ronald Draughon
Petitioner,

v.

Utah Department of Financial Institutions and Career Services Review Board,
Respondents.

20050217-SC
20030575-CA
7CSRB66

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed March 7, 2005.

IT IS HEREBY ORDERED pursuant to Rule 45 of the Utah Rules of Appellate Procedure the Petition for Writ of Certiorari is denied.

For the Court:

Dated May 26, 2005

s/Christine M. Durham

Christine M. Durham
Chief Justice

IN THE SUPREME COURT OF THE STATE OF UTAH

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Ronald Draughon
Petitioner,

v.

Utah Department of Financial Institutions and Career Services Review Board,
Respondents.

NOTICE OF DECISION

20050217-SC
20030575-CA
7CSRB66

The above entitled case was submitted to the court for decision and the attached order has been issued.

Order Issued: May 26, 2005

Notice of Decision Issued: May 31, 2005

BOARD OF FINANCIAL INSTITUTION, #7CSRB66

s/Pat H. Bartholomew
Pat H. Bartholomew
Clerk of the Court

STATE OF UTAH
SUPREME COURT
JAN. 4, 1896

By s/Maren Larson
Deputy Clerk

5/31/05
Date

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No. 05-548

In The

Supreme Court of the United States

RONALD R. DRAUGHON,

Petitioner,

v.

UTAH DEPARTMENT OF FINANCIAL INSTITUTIONS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Utah Court Of Appeals

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Both the Utah Career Service Review Board and the Utah Court of Appeals expressly determined that the factual record showed that Draughon never sought to return to work in any capacity at the conclusion of his medical leave. Should this Court grant Draughon's petition to review the legal questions presented where all three questions are based on the factual premise that Draughon had sought to return to work?

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION

Respondents Utah Department of Financial Institutions (Department) and Utah Career Service Review Board (CSRB) submit this brief in opposition to a writ of certiorari to review the unpublished judgment of the Utah Court of Appeals in this case, *Draughon v. Dep't of Fin. Inst.*, 2005 UT App 44, 2005 WL 247582.

JURISDICTION

The Utah Supreme Court entered denial of certiorari on May 26, 2005 (Appendix to Petition at 58). Draughon's petition for a writ of certiorari was timely filed on August 23, 2005.

STATEMENT OF THE CASE

Ronald Draughon had been employed by the Department and had taken unpaid leave, first under the Family Medical Leave Act and then under Long Term Disability (LTD). When Draughon exhausted his LTD, including Department granted extensions, he was terminated from his employment with the Department for failure to report back to work as of October 19, 2000. On November 14, 2000, Draughon grieved his termination to the CSRB.

In its Decision and Final Agency Action, dated June 19, 2003, the CSRB upheld Draughon's termination (Appendix to Petition at 33-57). Draughon filed a Petition for Judicial Review with the Utah Court of Appeals dated July 16, 2003. On February 3, 2005, the court of appeals affirmed the decision of the CSRB. *Draughon v. Dep't of Fin. Inst.*, 2005 UT App 44, 2005 WL 247582 (Appendix to Petition at 1-4). Draughon filed his petition for a writ of certiorari with the Utah Supreme Court on March 7, 2005. It was denied by that court on May 26, 2005. His petition for a writ of certiorari to this Court was filed on August 23, 2005.

STATEMENT OF RELEVANT FACTS

Draughon was an employee of the Department for several years and was a career service employee on LTD leave status at the time of his termination. During the spring of 1999, Draughon was experiencing severe medical difficulties and requested accommodation for his condition. Effective May 18, 1999, Draughon was placed on medical leave status based on his inability to perform his work as a Senior Bank Examiner. On September 1, 1999, Draughon was placed on LTD based upon his total disability.

Draughon, by rule, was entitled to a one-year medical leave, beginning on the last day that he had worked. Utah Admin. Code R 477-8-7(8) (2000). This one-year period was initially extended as Draughon and the Department were negotiating a resolution to a previous grievance and litigation filed by Draughon. On August 18, 2000, Commissioner of Financial Institutions G. Edward Leary issued a letter to Draughon informing him that he would be required to return to work by September 18, 2000. At Draughon's request, this deadline for returning to work was extended.

A further extension was then granted for the petitioner to meet with his doctor and obtain a medical release to return to work. Instead, Draughon's doctor's letter of September 20, 2000 stated that the petitioner was "unable to return to work and remains fully occupationally disabled as I have indicated in the past." Draughon did not report back to work at the end of his medical leave, and requested only that he be granted an unlimited extension of his medical leave until "I am able to perform the essential functions of the job."

On October 11, 2000, Commissioner Leary sent to Draughon a letter entitled "Notice of Intent to Terminate." This letter informed Draughon that he could meet with Commissioner Leary on October 19, 2000 for a hearing concerning his termination. On October 20, 2000, Commissioner Leary issued a Notice of Termination to the petitioner, effective as of the close of business on October 19, 2000.

REASON FOR DENYING THE PETITION

I. THE ISSUES RAISED BY THE PETITIONER WERE NOT CONSIDERED BY THE UTAH COURT OF APPEALS AND THE UTAH CAREER SERVICE REVIEW BOARD BECAUSE THE FACTS OF RECORD SHOWED THAT THE PETITIONER NEVER SOUGHT TO RETURN TO WORK

In his petition for a writ of certiorari, Draughon presents three questions for review. All of these questions are based on a factual presumption that Draughon sought to return to work at the conclusion of his LTD and was denied this right by the Department. But both the CSRB and the Utah Court of Appeals expressly rejected this claim. Both found that Draughon was terminated because neither he nor his doctors indicated that Draughon could return to work for the Department in any capacity, regardless of what accommodations might be provided.

The CSRB found the following undisputed, relevant facts to be supported by evidence in the record. Draughon was on medical leave starting in May, 1999. By regulation, the petitioner had a right to return to work, if capable of doing so, within one year of going on medical leave. Even after the Department granted several discretionary extensions to this one-year period, neither Draughon nor his doctors ever told the Department that the petitioner was able and willing to report back to work. The Department was repeatedly told that the petitioner could not return to work and that he needed an indefinite extension of his medical leave instead.

The petitioner stipulated to the undisputed fact that he never asked the Department to permit him to return to work. The Department offered him the very job that he was seeking in separate litigation. Draughon and his doctors informed the Department repeatedly that the petitioner could not return to work and that they could not say with any exactness when he could return to work. Instead, the petitioner sought an extension for an uncertain period of his already expired medical leave. The CSRB correctly determined that the Department

acted properly in terminating the petitioner. In reversing its hearing officer, the CSRB explained that:

> It is neither rational nor reasonable to conclude that Draughon could have returned to work in some capacity in October 2000 and that the Department violated policy based on Dr. Stevens' opinion 18 months later when the Department was unaware of those alleged facts. The Hearing Officer committed reversible error when he ruled that Draughon's termination was a result of his "miscommunication" with the Department. In fact, there is no substantial evidence to support a finding that there was "miscommunication." Draughon's responses to the Department are clear and unambiguous. He stated that he was unable to return to work. He stated that his doctors would not release him to return to work. He stated that he would not return to work. He never stated, however, that he wanted a different position with the Department. In addition, there is simply no evidence, let alone substantial evidence, in the record to support the Hearing Officer's conclusion that the "miscommunication" was not intentional, but rather a result of Draughon's disability.

(Appendix to Petition at 54-55).

In affirming the CSRB's decision, the court of appeals reached the same factual conclusion.

> [I]f the employee is unable to return to the previous position, the Department is required to "place the employee in the best available, vacant position for which he is qualified, if able to perform the job with or without reasonable accommodation." Draughon asserts he was able to return to work with reasonable accommodations or in a less-stressful position. However, the record does not support this assertion. The record indicates only that he was unable to return to work. Draughon's physician stated in a letter to the Department, "[i]t is also my opinion that he is, at this time, unable to return to work and remains fully occupationally disabled as I have indicated in the past." From May 17, 1999, until October

> 17, 2000, Draughon never notified the Department that he was ready and able to come to work in any capacity. Draughon's last letter prior to termination does not state in the affirmative that he was able and willing to return to work nor does it request accommodations. Rather, the letter merely outlines the Department's duties under the law. The Department may only place an employee in a vacant position if the employee is able to perform the job. The Department had no way of knowing of Draughon's capabilities without some affirmative notification from him. The Department's conclusion that Draughon was unable to return to work in any capacity is reasonable.

(Appendix to Petition at 3-4) (citations omitted).

The issues of law raised by Draughon in his petition were not addressed by the court below because the factual record showed that Draughon had never asked to return to work in any capacity. Draughon's termination was based on the fact that petitioner had not asked to return to work in any capacity. Both the CSRB and the Utah Court of Appeals found that the Department's conclusion was supported by the administrative record. The factual findings of the Department, under Utah law, are reviewed deferentially. The question is whether there is evidence in the record to support the Department's conclusions. *Career Serv. Review Bd. v. Utah Dep't of Corr.*, 942 P.2d 933, 942 (Utah 1997). Because the petitioner refused to return to work, with or without accommodations, the legal questions that Draughon seeks to raise are not properly before this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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